Speaking Truth to Power
III

March 14 – 15, 2002

Self Government: Options and Opportunities

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Introduction

The journey to reach treaties is a long and winding road. Sometimes we get so caught up in the road map that it's hard to see the important landmarks along the way — and the miles of opportunity stretched before us.

There are so many of us journeying this same road, but often we are travelling disparately. If we could just learn to journey this road together, the opportunities before us would be much more achievable.

Talking about Treaties . . .

In March 2000, the Treaty Commission and the Law Commission of Canada brought together a group of opinion leaders — aboriginal and non-aboriginal, industry and government — to talk about the future of treaty making in British Columbia. The two-day forum, *Speaking Truth to Power*, initiated an important legacy for collaborative thinking.

Building on the momentum of this forum, the Treaty Commission hosted *Truth II*: a forum focused exclusively on finding solutions. The Treaty Commission considered many of the ideas by participants at *Truth II* as part of its widely read *Review of the BC Treaty Process*.

Self Government: Options and Opportunities

Last year, Dr. Stephen Cornell's research on indigenous nations in the United States made an enormous impact on the two-day exchange and indeed, on the way we think about treaty making in this province. His overriding point — that the ability to make decisions is strongly linked to economic success on indigenous lands — propels traditional thinking on self government to a whole new level.

This year, the Treaty Commission invited 14 speakers — including Dr. Cornell — to share their unique insights on self government. And, though the speakers had very different perspectives, what they shared was a mutual desire to find creative solutions to achieve self government.

The Canadian Government recognizes that aboriginal people have an inherent, constitutionally-protected right to self government—a right to manage their own affairs. In recent months, the debate over inherent and delegated models of governance has polarized our conception of governance. Truth III sought to look beyond 'models' of governance to the big picture of 'how can we get there?'

Dr. Cornell sees enormous opportunity in the BC treaty process for the kind of nation-building and genuine self-rule illuminated by his research. Realizing this vision is one of the most important challenges faced by the treaty process, and Canadian society at large.

The discussion that ensued at *Truth III* was prolific, uncovering many hidden truths in the quest to achieve self government. To capture the unique exchange of ideas that took place at *Truth III*, the Treaty Commission produced this speech collection.

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Keynote Speakers

Dr. Stephen Cornell's work as part of *The Harvard Project on American Indian Economic Development* is widely regarded as one of the most innovative and influential projects on self government. Co-founding the Harvard Project with Professor Joseph Kalt in 1986, Dr. Cornell has worked closely with First Nations in the U.S. and Canada on economic development, governance and policy issues. Dr. Cornell directs the Udall Center for Studies in Public Policy at the **University of Arizona**.

Osgoode Hall Law School Professor **Kent McNeil** is distinguished internationally for his work on the rights of indigenous people in Canada, Australia and the U.S. Before joining Osgoode Hall as a Faculty member in 1987, Professor McNeil served as Research Director at the University of Saskatchewan Native Law Centre. Professor McNeil has authored numerous, highly-acclaimed works on constitutional matters, self government, fiduciary obligations and treaties.

The **Honourable Robert Nault** has served as Minister of **Indian and Northern Affairs Canada** (INAC) since 1999. Under Minister Nault's leadership, INAC is working towards reforming the *Indian Act*. The initiative, *Communities First: First Nations Governance*, strives to promote effective, responsible and accountable governance. Minister Nault has represented Kenora-Rainy River — the largest constituency of aboriginal people in Canada since 1988.

Moderators

Wilf Adam has served consecutive terms as the First Nations Summit appointee to the Treaty Commission since 1995. Former Chief Councillor of the Lake Babine Band and chair of the Burns Lake Native Development Corporation, Adam co-founded the Burns Lake Law Centre. Adam was born in Burns Lake and raised at Pendleton Bay.

Debra Hanuse has served the Treaty Commission continuously since she was first appointed by the First Nations Summit in 1998. Prior to this post, Hanuse practised corporate, commercial and aboriginal law with the firm of Davis & Company. In 1995, Hanuse began her own practice where she was involved in treaty negotiations on behalf of First Nations. Hanuse is a member of the 'Namgis Nation of the Winalagalis Treaty Group.

Peter Lusztig was first appointed to the Treaty Commission by the government of Canada in April 1995. Former Dean of the UBC Faculty of Commerce, Lusztig holds an MBA from the University of Western Ontario (1955) and a PhD from Stanford University (1965). Lusztig has played an active role in public affairs, including service with one royal commission and numerous business boards.

Speaker Biographies

Jim Abram, past president of the **Union of BC Municipalities** Executive (UBCM), has a long and varied history of community activism. Amongst this experience, Abram sat for four years on the Central Coast Land Management Plan and recently served on the Community Charter Council. The UBCM represents 181 local governments in B.C.

Jim Aldridge, partner at the Vancouver law firm **Rosenbloom & Aldridge**, represented the Nisga'a Tribal Council in treaty negotiations from 1980 to 2000. Aldridge continues to represent a variety of different clients in the areas of aboriginal rights and constitutional law. Since 1981 Aldridge has served as adjunct professor at the University of British Columbia Faculty of Law.

Graham Allen, partner, **Snarch & Allen law firm**, has extensive experience with aboriginal governance. In particular, Allen represented Sechelt Indian Band in the self-government agreement achieved in 1986 and the agreement in principle reached in 1999. Allen's recent work includes the Westbank Self Government Project and the First Nations Think Tank on Wealth Creation, which has an important focus on governance.

Allan Edzerza serves as Assistant Negotiator representing the interests of **Kaska Nation** in the BC treaty process. In previous posts, Edzerza served the government of Canada as Assistant Self-Government Negotiator and as senior policy advisor for the Nunavut Land Claim Implementation Panel. Edzerza is a member and former Band Administrator of the Kwanlin Dun First Nation — the largest Indian Act band in the Yukon.

University of Victoria Law Professor **Hamar Foster** is renowned for his work on aboriginal rights, and particularly, for his expertise on the history of the 'land question' in B.C. Professor Foster practised law in Vancouver before joining the UVic Faculty of Law in 1978. He also served the BC Civil Liberties Association and the Canadian Law and Societies Association.

Claire Marshall, co-director at the **Institute on Governance** (IOG) since 1992, has over 25 years' public policy experience. Marshall has designed and delivered over 1000 policy-making workshops in Canada and numerous governance and public policy initiatives abroad. As head of the IOG's 'Learning Centre', Marshall delivers a range of governance development programs and learning events.

Prior to negotiations in the BC treaty process, **Federal Chief Negotiator Tom Molloy** represented Canada from 1982 to 1993 in negotiations leading to the creation of the Government of Nunavut. Molloy also represented Canada in the *Nisga'a Treaty* negotiations. He is currently involved in negotiations with the Inuit in Northern Quebec.

Dr. Greg Poelzer chairs the Political Science Program at the **University of Northern British Columbia**, where he specializes in aboriginal-state relations, comparative Northern development, aboriginal self government and the politics and government of the Provincial Norths. From 1999 to 2000, Poelzer served as a member of the Northern Land Use Institute Committee.

Sophie Pierre is chief of the **St. Mary's Indian Band** and administrator for the **Ktunaxa/Kinbasket Tribal Council**. Chief Pierre has served on the BC Claims Task Force and as co-chair of the First Nations Summit. She currently chairs the Ktunaxa Independent School System, the St. Eugene Mission Development Board and co-chairs the Indigenous Nations Institute at the University of Arizona.

Murray Rankin, managing partner, **Arvay Finlay, Barristers**, has served as treaty negotiator in several negotiations. Acting for BC, Rankin negotiated an agreement in principle with Sechelt Indian Band and an adhesion to Treaty 8 with the McLeod Lake Indian Band. Rankin also acted as lead counsel for the Yukon government's self-government legislation and constitutional reform.

Dr. Tim Raybould is Director of Intergovernmental Affairs and Treaty Negotiator for **Westbank First Nation**, In addition to his work with Westbank and his Ph.D (Cambridge 1993) on aboriginal rights and self government, Dr. Raybould advises the First Nations Finance Authority, the Indian Taxation Advisory Board and the First Nations Land Management Board.

Edmond Wright, first elected Trustee to the Nisga'a Tribal Council in 1970, has served continuous terms as Secretary Treasurer to the the Council and the **Nisga'a Lisims Government.** As Institutions Negotiator for the Nisga'a Nation negotiating team, Wright played a key role in fiscal arrangements and was intimately involved in all other areas of the Nisga'a Final Agreement. He is a member of the Gitwilnaak'il.

The Harvard Project Findings on Good Governance

There are a number of familiar faces to me in the room here, and some of what I have to say is going to sound quite familiar. Some of you have heard me talk about these things before. My task this morning is to summarize for you some of the research results of the Harvard Project on American Indian Economic Development, which Joseph Kalt and I started at Harvard University in the late 1980s.

I want to give you a little bit of background to what we did and why this project is still ongoing. We're still gathering results and learning about economic development and a great deal more among indigenous Nations. I'll then summarize for you both the findings of this project and what we think some of the implications may be for you.

I should say for that latter part, I'll be going out on a limb. This is work from the United States. We are working more and more often with First Nations in Canada, but compared to the work we've done in the United States, we're very much in the early stages of understanding your situations here. The more time we spend in Canada the more convinced we've become that there is significant learning from the US cases that is applicable here, but that is really something which you will have to decide, not me. You bring to these results intimate knowledge of the challenges you face and of the history that you carry and much greater knowledge of those things than I can muster at this time.

What was the beginning of this project? In the late 1980's, imagine a couple of nerd academics sitting around Harvard University and they've been looking at some data. It's data on economic outcomes in what in the United States is known as Indian country, a legal term referring to reserved lands and Indian Nations. Those data turn out to be pretty interesting because Indian country is poor in the United States, in most cases extremely poor. There is no population in the United States with such high indices of poverty, ill health, other social problems as the reservation-based, reserved land-based indigenous population. The only populations that compete with American Indians in the US for that dubious distinction are inner city black and Latino populations.

But as we looked at data across the United States, some interesting things stood out. Indian country is poor but it's not uniformly poor. Across the United States we found examples of Indian Nations succeeding in building sustainable, self-determined economies. I'll give you a few quick examples, some of which you're probably familiar with. The Mississippi Choctaws on several small pieces of land in the state of Mississippi today import labour. They import labour because they've created so many jobs, there are not enough Choctaws to fill them. Every day about 5,000 black and white workers drive on to Choctaw land to take jobs in Choctaw-owned and -operated industries. This is a Nation with one of the highest rates of indigenous language retention in the United States. The people speak Choctaw.

The Citizen Potawatomi Nation in Oklahoma: This is a Nation that today has close to 20,000 people. In 1975 they had only a few acres of land and less than one thousand dollars in the bank. Today they own the First National Bank of Shawnee, Oklahoma, and they're the economic engine of that mixed-race region. The Confederated Salish and Kootenai tribes of the Flathead Reservation in northwest Montana run a tribal college that gets applications from non-Indians because it provides the highest quality education in that part of the state.

The Cochiti Pueblo in New Mexico, an extremely traditional, conservative place where both government and culture look substantially the way they did when the Spanish arrived in the southwestern US, today has unemployment rates among the lowest of Indian Nations in the west. It has one of the most efficient and effective development corporations in Indian country.

The White Mountain Apache Tribe in Arizona in the 1980's ran the most productive sawmill operation in the western United States, tribally owned and operated and outperforming Weyerhaeuser and other timber operators in the Rocky Mountain region.

We looked at cases like that, and of course the question that came into our minds was, what in fact is going on? There's a puzzle here. Some Indian Nations are doing much better than others. How can we account for that? And we set out to try to get an answer to that question. We did so through systematic analysis of quantitative data, but the primary tool we used was several years of in-the-field case studies working with what had started out as a sample of 12 Nations and within a few years had become many more than that, including Nations who were doing very poorly and Nations that were doing very well, trying to understand why some were doing so much better than others.

Of course there's some common wisdom on this, and we started with some of these answers in mind: it must be gaming; maybe this gambling thing is the key to economic development.

Or maybe it's location. Indian Nations close to metropolitan areas are will be doing much better than those that are far from such markets. Or perhaps it's natural resource endowments or the rate of education or maybe it's just inspired leadership or something like that.

All of those answers we carried with us into the field and of course these things are useful. You'd rather have them than not, but they were not the critical differentiators between sustained economic success and continuing and persistent poverty.

So what did we find? Four factors emerged from this research, and we continue to find support for these factors across the United States. And we're beginning to gather information on other societies where the indigenous people face European settler regimes similar to the United States: Canada, New Zealand, and Australia. Sovereignty matters. That's the term in the United States. I know in Canada that's a term that has particular connotations. Someone up here said, 'that's the "S" word, don't use that word.' Let's call it "jurisdiction" if you prefer. Then there's effective governing institutions, something we call cultural match and a strategic orientation.

Now, I want to go through each of these and say a little bit about them and what we think the evidence says.

Jurisdiction matters

First of all, the key finding on sovereignty or jurisdiction is that jurisdiction is a necessary but not sufficient condition of sustainable development. We have yet to find a single case in the United States of sustained economic activity on indigenous lands in which some governmental body other than the indigenous Nation itself is making the decisions about governmental structure, about natural resource use, about internal civil affairs, about development strategies and so forth.

It appears that this is a necessary condition of sustained development on reserved lands. It means genuine decision-making power. We've said to some indigenous Nations: "Who's deciding how many board-feet of timber get cut on your land?" If you're deciding, that's jurisdiction, if some other body — the state, the federal government, someone else — is making that decision or approving your decision, that is not jurisdiction. Who's deciding what your relationship will be among yourselves as Nations? If someone else is, that's not jurisdiction. Who's determining your development strategy? Who's determining how you spend money in your name? If the answer is the Nation is, that's jurisdiction. If the answer is someone else, then you do not have jurisdiction, and development has just become much less likely, no matter what else you do.

Why does jurisdiction matter? First of all, it puts the development agenda and control of the necessary resources in indigenous hands. Without jurisdiction, indigenous Nations are subject to other people's agendas. You can't ask people to be accountable if you don't give them decision-making power. Whoever is making the decisions has the accountability. To reserve decision-making power in one place and then tell someone else that they're accountable, is to kid yourself. Jurisdiction marries decisions to consequences, which leads to better decisions.

In the United States the equivalent of INAC (Indian and Northern Affairs Canada) is the Bureau of Indian Affairs. Throughout most of the last two centuries the Bureau of Indian Affairs was making the major decisions in Indian country. But when they made bad decisions, did they pay the price? No, the indigenous Nation paid the price. In other words, there was no link between decisions and their consequences and therefore no discipline on the decision-maker to improve the decisions.

When decision-making power moves into indigenous hands, they absorb the consequences when they screw up. They reap the benefits when they make good decisions. The consequences are that over time the quality of the decisions improves. You have to allow time for learning and time for mistakes, but our evidence is that over time indigenous Nations are much better decision-makers about their affairs and resources than anybody else is because it's their future that's at stake. And when they screw up, they say next time we'll do it differently.

Jurisdiction has concrete bottom-line payoffs. We now have tested this in the timber area, we've tested it in the area of housing, and we've tested it in the area of gaming. What we've discovered is that as decision-making power moves into indigenous hands, economic performance improves. In a systematic examination of 75 Indian Nations in the United States with timber resources, we looked at whether those timber resources were being effectively managed by the Bureau of Indian Affairs or by the indigenous Nations involved.

For every job that moved from the Bureau of Indian Affairs management to indigenous management, profits and profitability rose. We found similar indications of increased effectiveness and efficiency in housing and in the gaming market. There's a bottom-line payoff to jurisdiction.

Governing institutions matter

But it turns out that jurisdiction is not enough. The second of our findings is that effective governing institutions are necessary. You have to back up power with the ability to exercise it effectively. In some ways the sovereignty/jurisdiction piece is entirely about the relationship between indigenous Nations and other sovereigns. When you move to this second finding on effective governing institutions, the focus turns to indigenous Nations themselves and whether or not they can deliver what has come to be known as good government.

What does this mean? Our evidence focuses on four things. *First: stability.* That's not stability in terms of who's calling the shots; it's not stability in elected leaders or something like that; it's stability in the rules of the game, the way things are done. We have one Nation, a very successful Nation in the US, where there is a 100 per cent turnover in the senior leadership in the tribe every December 29, because they run a traditional governing system in which the senior spiritual leader of the Nation appoints the civil leadership every December 29.

But in this particular Nation, which is one of the most successful in the United States, the rules of the game, the way things are done, don't change. So despite the fact you get 100 per cent turnover in tribal administration, anybody dealing with that Nation knows everything is going to be done exactly the same way, it's predictable, it's stable. There are new faces but the same decision-making patterns.

The second part of the good governance equation: Is there separation of politics from business and program management? We've been gathering evidence for some time now about how businesses and programs are organized within Indian Nations in the United States and we've been asking two questions really. Number one: Do elected leaders have direct management control over either businesses or government programs? That is, do they can control the hiring and firing, do they control day-to-day management of those programs. Are they micro-managing?

Number two: If they are businesses, are they profitable? And if they are programs, are they effective? Our evidence indicates very strongly that separating politics from day-to-day business and program management yields in the business area a 400 per cent increase in the chances of profitability, other things being equal. Getting the politics out of the management again has bottom-line payoffs. It's harder to quantify these things in the program management area, but in case after case we see more effective social programs when you separate strategic decision-making by elected leadership from day-to-day program management by administrators.

Third part of the good governance finding: Is there effective and non-politicized resolution of disputes? One of the distinguishing features of the United States' indigenous Nation situation, vis-à-vis Canada, is the presence in most indigenous Nations in the United States of tribal judicial systems, tribal courts that have significant power in many cases. But in many cases they are heavily politicized. The route of appeal from the tribal court is to the council or the chairman or chief executive of the Nation.

We found that getting the politics out of dispute resolution reduces unemployment rates on average across Indian country in the United States by five percentage points, controlling for other variables. That's a relationship between unemployment and whether or not you've got a good court system. Why? Because having a good court system that deals with people effectively and in which court outcomes do not depend on who you voted for or who your relatives are, turns out to be a critical message to investors, including tribal members deciding whether or not they'll bet on the future here at home or move to Los Angeles. And when the court is depoliticized, the number of jobs starts to rise.

Finally, and still within the good governance finding: Is there a bureaucracy that can get things done, that can actually deliver the goods?

Why do these governing institutions matter so much? Because what governments do is to establish and enforce the rules of the game by which communities and their members organize, engage in action, interact with outsiders, cooperate, initiate businesses, etc. Those rules send a message to investors,—again I mean investors very broadly here, everybody from some person thinking of taking a job in First Nations' government to someone thinking of starting a small business on reserve land — and the message is, either do or don't invest here. But not just any governing institutions will do.

Culture Matters

So the first factor in success is genuine decision-making power, and the second is effective governing institutions. The third finding that's emerged from our research is something we call cultural match. This has to do with the nature of the institutions with which you govern. Two of the more successful tribes in our sample are the Confederated Salish and Kootenai Tribes at the Flathead Reservation in Montana and Cochiti Pueblo in New Mexico. Both of these tribes have been very aggressive in taking control over their own affairs, but they organize their affairs radically differently.

At the Flathead Reservation in Montana there are three tribes, Salish, Kootenai and Pend d'Oreilles, located by treaty on one reservation. They govern themselves through a set of governing institutions that look as if they came out of my high school civics textbook. I recognize all the pieces. It's classic, liberal democracy in action — parliamentary system, independent judicial system, election code, commercial code.

At Cochiti Pueblo in New Mexico there are no elections. There is no constitution, there is no legal code, there is no commercial code, there's no codification of law at all, other than in the memories and traditions of the people. And yet that Pueblo, as I said, is one of the more successful tribes in the United States, because in effect it does have a Constitution. That Constitution exists in the culture of the Pueblo itself, which today remains viable enough and powerful enough to compel certain kinds of behaviour from elected officials. Radically different solutions to the institutional problem, but there's cultural match.

The Flatheads have found a set of institutions that may not be anybody's first choice — the Salish might rather they were Salish institutions, the Kootenai might wish they were Kootenai institutions and the Pend d'Oreilles might wish they were something else. But what they have found is a set of institutions that is everybody's second choice, a set they can agree on as being effective for the things they need to get done. At Cochiti Pueblo they have a set of institutions that are so deeply embedded in the culture that their own legitimacy is never challenged.

So what we see is different answers to the same set of problems: designing governing institutions that match indigenous Nations' expectations of how authority should be organized and exercised. Why does it matter? Because if they're going to be effective, governing institutions have to have support from the people, they have to have legitimacy. Governing institutions that have legitimacy in Washington, DC, but don't have legitimacy in Pine Ridge, South Dakota, are not going to be effective at either governing or producing economic development at Pine Ridge. The question is what's legitimate in the community whose future is at stake.

Cultural match is about that. Institutions that match contemporary indigenous cultures are more successful than those that don't. On the other hand, there's no blank cheque: institutions have to perform. We've seen Nations who have admitted their traditional way of doing things isn't up to the challenges they currently face, but that doesn't mean they just grab a set of institutions off the shelf and plunk them down there. It means they spend some hard time trying to invent new institutions that they believe in and that are capable of getting the job done.

Strategic thinking matters

The fourth factor coming out of this research is strategic orientation. As one tribal leader said to us: "I don't have any power. Why should I engage in strategic thinking? I just deal with what comes in the door because somebody else is making all the big decisions." Dependency and powerlessness discourage strategic thinking, lead to crisis management, firefighting, band-aid kinds of programs and that sort of funding-driven decision-making that says, "What's our development strategy? Whatever we can find somebody to pay for."

In the tribes that we see that are successful, we see long-term thinking that asks, what kind of society are we trying to build? What are our priorities in building it? What are we trying to preserve and protect? What do we want to change? And then they make day-to-day decisions within that perspective, within that way of thinking. And this appears to do two things: It provides appropriate criteria by which to make decisions. How do we judge which of these options to take? Which one supports our strategic vision of the future? Which one protects our priorities? Which one helps answer our concerns? And it encourages politicians to serve the Nation instead of themselves, because there's an explicit sense of what the Nation is trying to do, and when politicians act in ways that don't support this, it becomes obvious.

So what do successful Indian Nations, at least in the United States, have in common?

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They assert the right to govern themselves and they exercise that right effectively by building capable governing institutions that match their cultures. We talk about this as nation building. We've described it in some of our work as a nation-building approach to economic development, as opposed to the standard approach to economic development in the United States where agendas have been set in Washington, DC, not by indigenous Nations themselves and where institutions have been imposed on indigenous Nations rather than developed by them according to their own political cultures, and in which those institutions seldom function to encourage investment and support the future.

Implications for building good governance

Now what are the implications of this? This is where I'm speaking, in a sense, out of turn. But I'll tell you what I sense from it, from what I know of the Canadian situation. For federal and provincial governments, it means *yield decision-making power,* support indigenous jurisdiction. Without that kind of power you lose the connection between decisions and their consequences, which all human societies benefit from.

My colleague, Joe Kalt, in testimony before the United States Senate said: "You would not be surprised if I pointed out that eastern Europe was unlikely to develop economically as long as the major decisions about it's future were being made in Moscow. Why would you be surprised then if I were to tell you that Indian country is not going to develop economically as long as the major decisions about it's future are being made in Washington, DC? "It's the same principle. Yield decision-making power."

Take nation building seriously. This is not about building administrative capacities. It's not about what the United States has seen — a shift of simply, "Okay we'll develop the programs here in DC, but we'll give you the money and you can make the administrative decisions in the field." It's about things like setting priorities, about building institutions that aren't just about running social programs, they're national institutions. They're about building different futures. They're about refiguring relationships with other sovereigns. They're about what kind of future people want.

Invest in institutional capacity building. There are a lot of federal programs in the United States that support sending people off to college or support getting Indian country computerized and so forth, all of which are good things. We need those programs.

We have fewer programs in the United States that take seriously what an indigenous Nation legislature has on its plate and says, "How can we help that legislature become better at doing its job". Or that takes seriously the challenge of running indigenous courts and provides programs for training judges; or that helps solve the question of how you link indigenous Navajo common law with Western jurisprudence, so the Navajo Nation can have an effective court system that operates in both worlds (which in fact the Navajo Nation has done without much support from the United States). It's a system worth looking at.

Invest in helping indigenous Nations build institutions that resonate with their own political cultures. It's not a "one size fits all" challenge, it's a diversity challenge that says, what all of you face is a similar set of problems, but your answers are likely to be all over the map. And what we need to do is find the answers that are yours and that work.

Provide resources and expect and tolerate mistakes. These are human societies — we all screw up. There's benefit in that. We need to allow it to happen. We need to resist taking the anecdote that says, look how these folks screwed up, look at the corruption here, look at this court case that clearly was abominably done, and use that as a broad brush with which, as a US senator used to say until he got voted out of office two years ago: "This is why indigenous sovereignty is a sham, we need to shut the whole thing down, get them into the cities and get them out of this reservation business."

We have to replace those anecdotes of failure with the stories — and we know they're here in Canada as they are in the United States — stories of successful indigenous Nations that are creating futures that are their own and that in many cases are outperforming non-indigenous communities across the country.

What do these findings mean for First Nations?

Take the responsibility that goes with decision-making power. We had one indigenous Nation chief in the United States who said to us: "The only thing wrong with this nation-building model and with us having all the powers is that I can't blame the feds for everything anymore." Well that's exactly right. When power moves into the hands of indigenous Nations, they bear increasing responsibility for outcomes.

But that's what sovereignty is about.

Take nation building seriously. Again, take those challenges seriously of how to build Nations that work. Invest in institutional capacity building, sometimes perhaps at the tribal level. I'm very much aware that among the differences between the situations of many First Nations in Canada and the situations in the United States are issues of size.

We have some of those issues in the United States, too. The Kumeyaay peoples, who are in a number of very small communities in southern California, some with populations under 100 persons, are discussing the creation of a Kumeyaay tribal court in which they could all participate, that would serve all of them, an intertribal court to overcome the disadvantages of size. This approach can help if you're small and you're to create a government capable of meeting the challenges you face in the contemporary world. In Alaska, similar kinds of things are in the works.

This raises the question of who's the self in self government? A question we've talked about a lot in the US, particularly in Alaska. At what level do you organize what kinds of power? It's not an all or nothing deal. Maybe some things are done at the First Nations level and some are done at the tribal level and maybe some things even at the regional level. There's no reason authority and power cannot be distributed across units where it can be effectively and best supported.

Change internal attitudes towards First Nations' government. This is a leap on my part because what I'm giving you is my sense of the United States. What we've encountered in the United States is a whole generation of young people on many reservations to whom government is solely about the distribution of resources. Elections are solely about who is likely to give me the most resources. Tribal governments are more about distributing goodies than about building a Nation and reshaping a future.

When we talk to tribal leaders in the US they view this as one of the biggest challenges they face. How they persuade their young people and themselves to rethink what tribal government is, to move from government as distributor of resources to government as a nation-builder.

Opportunities through the BC treaty process

Two last points. I've been very struck in the visits I've made to British Columbia by the opportunities offered by the treaty process. When I first heard about it, the discussions were often about claims. But the more I've looked at that process, the more it has struck me that the process has enormous nation building and constitutional potential, that this is one place where nation building is in fact taking place, perhaps intentionally, perhaps in some cases inadvertently. It's where people are rethinking what their governments should look like, where they're asserting powers. That strikes me as an enormously encouraging development, and yet another reason why the dragging of the feet on the provincial side in this process is troubling.

It seems to me to be shutting down a process that has enormous potential to do exactly the kinds of things that we see have such benefit in the United States.

The other thing that we have begun increasingly to try to convey in the United States is the fact that sovereignty, what I call jurisdiction here, is a win-win proposition. In the US the enemies of tribal sovereignty in many cases are the states themselves. But in our work on economic development, what we've seen is that when you get successful activity on indigenous lands, it tends to spin off all kinds of benefits to non-Indians.

Mississippi Choctaw is the major employer in that part of Mississippi. They're one of the largest employers in the state of Mississippi. When you go talk to those 5,000 black and white workers who are working in Choctaw-owned and -operated enterprises, you're talking to supporters of sovereignty. They view the Choctaw as the key to their future.

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In San Diego County in the 1990's, it was gaming tribes who were the only bright spot during a recession there. When everyone else was laying people off, they were taking people on.

The White Mountain Apache recreational activities, such as their trophy elk hunting operation that is a major stream of income to the tribe, and the ski resort that they run are what keep the motels in the towns of Show Low and Pinetop and Lakeside full during the winter, and those are non-Indian owned motels. The local chamber of commerce, when they want to think about the future, says, "What are the Apaches doing?"

If you think about things that way, you can make an argument — and our research makes this argument— that sovereignty is necessary for sustainable development on indigenous lands, and that successful indigenous development spins off benefits to non-Indians. So sovereignty is in the interests of Indians and non-Indians alike.

We're in the process of trying to gather more systematic data on that because it's a powerful and important policy argument, and we're convinced that it's right.

Finally, I was asked really to talk about governance, and I did talk about governance but we started with economic development. When Joe Kalt and I started the Harvard Project research, it was the economic issues in Indian country that motivated us. Indian country taught us that it was governance that was important. We learned that in the field. But I was reminded of it by Rocky Barrett, the Chairman of the Citizen Potawatomi Nation in Oklahoma. This is the Nation that went from having almost nothing in the bank in the 1970's to owning the First National Bank of Shawnee, Oklahoma today. And when I was talking to Rocky Barrett about how they made that transition, I said to him that the most interesting thing to me in what you've done is the work you did on your political institutions, because that seems to fit with what our research shows.

His response to me, in his own words, was: "Oh yeah, if you're not thinking about constitutional reform, you're not in the economic development ballgame."

I'd never before heard a tribal leader put "constitution" and "economic development" in the same sentence. It was his experience, learned the hard way in trying to build his Nation in Oklahoma, and it's what our research says as well. We think the focus of attention should be on helping indigenous Nations build themselves through competent governments that are of their own making.

Claire Marshall, Institute on Governance

The Institute on Governance Experience

This morning I will discuss what we do at the Institute on Governance, why we do it, and how we got to where we are. As Commissioner Debra Hanuse mentioned in her opening remarks, the Treaty Commission's *Review of the BC Treaty Process* contains several recommendations that relate to governance, including having a conference to review governance models, developing a province-wide table to identify governance interest and options and developing a permanent institute of governance.

All of these recommendations were made with the eye to developing governance structures that would support prosperous futures. I was a bit daunted to follow Dr. Stephen Cornell on the agenda because of his in-depth knowledge of aboriginal issues and aboriginal governance. There are a number of echos that you will hear in what I have to say today when I'm talking about governance in a much wider ranging area: international governance and national governance —the areas in which I've been working for the last 10 years.

My session focus is broken quite deliberately into two, because I was asked to talk about the Institute on Governance (IOG), how we got to where we are, what we did and how we did it. Secondly, I will devote a bit of time to building governance capacity. What does that mean? What is it and how do you do it?

The IOG started out about 11 years ago with nothing more than a man, a laptop and some very good ideas. Tim Plumtre, who is still managing director of the organization, had done a fair amount of thinking about policy and public policy and public institutions. He'd been a journalist, served in government as a public servant and worked in a minister's office.

Tim thought it would be a good idea to develop an organization that would be independent of government — a neutral third-party observer of changes that were going on in government. At this time, certainly at the federal level, the federal government had instituted the Public Service 2000 Reform initiative, was privatizing Crown corporations and reforming the regulatory approach. There was a lot of change going on, not only in Canada, but internationally. Focus on public sector reform was right at the top of the agenda.

A third party could observe how the federal government was making change from a neutral vantage point, with its own agenda. Secondly, a neutral observer could act as a window to share what was happening in Canada with a wider world and bring experiences back to Canada that were worthy of being adopted or explored here.

Tim had very little money — just enough to set up an organization. However, he was able to get start-up funding from a wide number of deputy ministers. I think by the end of the first year the institute had over 22 federal deputy ministers who were willing to give a little to the pot. This provided the start-up funding that the IOG needed for the first two years. Within a couple of years the IOG took out charitable status because of its education focus.

By 2002, the IOG have 18 staff and six associates. We are closing this year an office in Kuala Lumpur that we had for the last five or six years. We are completely self-funded. We undertake commissioned research, and we offer professional development programs for which people pay a registration fee just as they would for any professional development program.

Over the years we've managed to keep our head above water. Although the IOG is non-profit, that doesn't mean we can't make a little bit of a surplus, which is devoted to giving ourselves time to write, to think and to undertake research that perhaps isn't yet on top of anyone's agenda.

Being self funded has meant that we've become quite entrepreneurial and responsive. We're a bit different to an organization that has core funding or foundation grant money, because we have to work on things for which we can be paid eventually, for which there is sufficient interest that there will be a sponsor to help us undertake the work that we're doing. That has implications on how we recruit staff; it's not sufficient to have a long and continuing interest in research for its own sake — valuable though that may be. At the head of this organization, my fellow directors and I have to have an entrepreneurial sense of where we can find this funding and what projects are of interest to whom so that we can attract funding to support the IOG's work.

The IOG has developed a strong national and international suite of activities. I think we've probably been active in over 20 countries outside Canada, including Africa, Southeast Asia, the Baltics, the Balkans, Eastern Europe and the Middle East. These issues of governance and how to do a better job in governance are coming very much to the forefront in how countries seek to move through transition, whether it be political transition or economic transition.

The IOG's profile is very much web-based, which has been a complete development in the last decade. We issue all of our publications on the web. We're interested in getting the learning out, not in making money from it, and quite frankly, going into print on big documents is an extremely expensive hit and miss affair.

Our mission is to promote effective governance through thought and action, and we do this through easy words: create, share and apply. **Create** is the research that we undertake and share through professional development programs, conferences, workshops and publications and apply by providing advice to departments, organizations, band councils, individuals, international governments and international donor organizations. We are in fact an action-oriented think tank.

The information that can be shared through people who are like-minded and facing the same challenges is a very, powerful way of moving ahead knowledge on an issue. When we started work in Southeast Asia, we contacted the heads of public service commissions in six or eight countries and brought them together over a three-day event to discuss issues of common interest.

To begin with they thought what Vietnam, Brunei and Singapore have to share are very different cultural setups. But they were all tackling the problems of trying to be more open in their public service, trying to encourage transparency, trying to recruit good people into their public services and so on. They found that by coming together, by creating a network which is still very lively throughout Southeast Asia, they were able to help each other and share examples and case studies back and forth.

We've developed a clustered approach at the institute and I've used here our theme of aboriginal governance. We undertake research around a theme, some of the publications I've mentioned. We've provided advice to governments and aboriginal organizations. We undertake public education through our website, policy briefs and conferences.

My co-director, John Graham, was out here just last week with a conference that was on urban aboriginal issues. It was a second in a series of conferences that we're running.

We offer workshops for aboriginal organizations to help them think through how to refresh their own approaches to governance, how they can make clear the difference between political and civil service links. What are the roles of staff, what are the roles of the leaders? What is the role of citizens in that area?

Finally, we offer courses for public servants. We've had for a number of years now a two-day program on building better relationships with aboriginal peoples, to help them understand the history and desires and intentions of the aboriginal communities.

We found over the years that there is a growing synergy between the themes. When we started out we thought aboriginal issues were quite unique and unto themselves. But lately we found that what we were doing in accountability and performance measurement is beginning to feed into and feed from our work in aboriginal governments. Our work on board governments in the voluntary sector, again picks up echos and lessons from some of the other themes that we are working on. How we go about building policy capacity has an enormous amount to do with accountability regimes, and over time we're finding that the wealth and the understanding that we're gaining is multiplying.

Again, synergy amongst activities — if we undertake research we are able to provide advice based on that research. And providing advice in five or six countries means that we can bring that understanding back and share it further through publications and workshops and it strengthens our research activities at the same time.

We have a very simple business plan. We're always on the hunt for steady revenue — foundation grant monies, continuing core funding. We are independent, but there's a price for independence; you have to find some sort of sustaining fund to keep you going.

Over the years, we have found a couple of very large projects. The IOG project in Southeast Asia, funded by CETA, enabled us to undertake research, case studies, pilot studies, conferences and to produce a couple of books. Lately, our learning activities have provided the sustaining funding that we have really been looking for over the years.

The workshops are proving extremely popular. I assume that is based on them being extremely useful. People signing up for the courses keeps a steady stream of funding coming into the institute and that enables us to take the time we need to write papers and research, which may not be paid for in other ways.

We found that having a good reputation is absolutely critical — I suppose it almost goes without saying — but more than in other places that I have worked, a good reputation is based very much on your last piece of work. You have to be extremely sensitive to quality all the time, and that speaks not only to the quality of the product or the services that you're offering, but being choosy about what you decide to work on.

We often have phone calls saying "would you work on X, Y or Z" and we say "well it doesn't really relate to governance, sure sounds like an interesting project but it's not us and you would probably be better off going to someone who is more expert in that particular area". I think that strengthens our case for being sure that we focus on what we do best.

This need for quality to recruitment also speaks to recruitment — how we select the people who come in. Everyone who joins the institute has to take, and this sounds a bit quaint I suppose, a writing test. Can you actually write. Everyone says yes we can, so we test it out because we need people who can write clearly, who can present a logical argument and who don't have to have somebody looking over their shoulder all the time to correct basic language.

We are idea based. We very often create ideas of our own, rather than responding to requests for proposals or big tenders. In fact I think over the ten years I've been with the Institute, we've only responded to five of formal big tenders. We find it much easier and more exciting frankly to get an idea and match it with someone who feels, yes this answers a problem or a desire that they have.

In consequence our client relationships tend to be long term. We nurture them. We do things pro bono for clients who we have been working with over time, and word of mouth spreads news about what we can do. I think that is the most valuable way to build trust in an organizations. If you're setting up an institute for governance, whatever title it has, then that strength of quality and responsiveness and then the passage of the good news by word of mouth can be of great value to you.

We have constant challenges, I don't think they will ever go away. Trying to achieve balance between what we do, trying to achieve balance between the amount of professional development that we offer and the amount of research that we can do. Our board of directors has said don't get carried away on the professional development front, you are a research organization and make sure you continue to put time and effort into that.

Maintaining independence is very difficult. Our paper on potable water is a good case in point. It's quite critical of the federal government, but it's based on good thinking and sound analysis, and we worked very closely with the federal government, with Indian and Northern Affairs, and we were really rather concerned that this would this be seen as biting the hand that feeds us in some way. But our board strongly urged that we maintain our independence and publish documents of this kind and get with the idea, not of creating trouble, but of shedding light on problems and issues as they come up. So maintain independence.

The lack of sustained funding, I've mentioned, means a constant need to keep an eye on where the next initiative might come from and how to provide the resources that you need to grow. Making the most of the board's talents. Because we are very much driven by the interests of the staff, my fellow directors and myself, and because we don't have large pots of money coming in from other sources, it means that what we do at the institute is very much driven by the staff, rather than by the board. I think if the board had access to a large sum, they would have a much more day-to-day role to play in terms of directing what the Institute does.

In that way we're a little different than most non-profits. We have an excellent board, but the day-to-day is very much driven by us and we take to our board questions, issues, problems, such as this one on biting that hand that feeds us.

Managing growth. We've gone from one to 20 people in 10 years, and that in itself creates stresses and strains inside an organization. We're constantly looking to see where the puck will be. What is the issue that will be of interest in the area of governance in the next two, three years, not right now.

That's a bit on the institute itself, and I've also been asked to speak to building governance capacity, which as Dr. Stephen Cornell touched on it several times during his discussion, I'll go through quite quickly.

There are a lot of definitions around and I think it's worthwhile sort of taking what is governance. Governance is a whole lot more than government. In fact if you read this definition through, all of these definitions, you'll see that the word government doesn't even appear. So where is the government in all of this? The government is but one player in our version of governance. Government, NGOs, voluntary sector, unions, groupings, formal groupings of civil society.

The three spheres here, when in balance, have proven to lead to be a pretty good predictor of improved quality of life for the country. If you look at former Russian countries, you will find that government is still very, large. They own and control many of the businesses. Civil society is not strong enough and does not play a very full role in moving the country ahead and they're struggling; they're still in transition.

I think this is an echo of what Dr. Stephen Cornell was saying when he commented on the need to get things in balance. And again, an echo from Dr. Cornell is the importance of history, traditions, culture and technology in a successful governance system. You can take a model from one country to another and it won't work, even if it was very successful in the first country. That's because we're all different. We have different desires, different ways of expressing our cultures and traditions. If you try to make changes in governance without bearing that into account, you're pretty well doomed to failure.

Why should we care? A World Bank study found that higher per capita incomes, lower infant mortality, higher literacy — all laudable goals — seem to be hand-in-hand with good, effective governance relationships. Building capacity. Capacity is simply building independence by increasing competence; being able to do things yourself and not having to turn to another level of government or another outside organization for permission on how to move ahead.

I would like to share some international lessons on building governance capacity. Money isn't everything. There's a great tendency to throw money at problems, but often it's the informal, well informed cultural shift that doesn't cost much money, but is very carefully honed to the organization.

Changes in governance, building governance capacity, takes a long time. We're really talking about attitudes here, personal attitudes that can take up to a generation to change. So it's not going to be done tomorrow, you really have to have an eye on the very distant horizon.

Top level drive is key. If you're working inside a national government then to have the Prime Minister involved is very helpful. This was the case in the UK when they brought in a number of reforms in the early nineties, but in Canada when we brought in reforms they were not supported in the same direct way by Brian Mulroney and it faltered, it didn't really take a hold for a long time.

Models are just that. A good idea for a governance change in one country doesn't necessarily work in a second one. There are many targets to consider when trying to build governance capacity. Individuals, organizations and systems are very different.

For individuals, there's training on the job. It's often an area where people say: "Ah, we've got to make a change. We want to strengthen policy capacity in this organization, let's send someone on a course, on a workshop, have them go shadow someone who is more successful." Establishing an association, pay and benefits can help. If you're paid better, then hey, you're going to do a better job, one would hope, or at least not seek a second moonlighting job.

Certification regimes, such as taking out a CAA course, belonging to an official organization, all of this can help an individual do a better job. So can exchanges, going and working in the voluntary sector if you're a government official or being the voluntary sector person into government to develop understanding and networks.

These are inexpensive, fairly low risk approaches to trying to improve governance capacity. They're not necessarily the best ones. If you go into organizations this becomes much higher risk, more expensive, but in a way more effective and long term because you're tweaking not just a single individual, but the whole organization in which that person is working.

When the IOG was asked to go to Latvia to undertake a review of government communications, we didn't just look at individuals and training opportunities that the government wanted us to do; we also took a look at the whole organization. How are communications coordinated, what are the relationships with the media? Are the NGOs getting what they want? It went well beyond individual communications offices. This stands for systems as well. Maybe it's not an individual, maybe it's not an organization, it could be an entire system that you want to change. The Romano Commission of the health care system is an example of that.

These are the most expensive and highest risk, but if they work they can make change dramatically.

So when looking at a governance challenge I think it pays to look at the individual. Again, the Latvian case, looking at a communications officer, went beyond that. We provided training for ministers. We provided training for deputy ministers, because they have a role to play in government communications, and which organization, not just government but the NGOs, and which system, not just communications but policy development. Always look for a holistic approach when trying to change a governance system and build capacity, because as I said, you're really going beyond government here. You're working right across those three spheres in a governance system.

In conclusion, when building an institute maintain a focus, maintain relevance and maintain independence as far as you can. When building governance capacity, think broadly; think beyond the obvious and be as inclusive as you can — bearing in mind the three spheres, the three 'actives' that make change in a country.

Chief Sophie Pierre, St. Mary's Indian Band

Self Government — The Ktunaxa/Kinbasket Experience

I'm here to share the Ktunaxa/Kinbasket experience as we live it today. But, before I start I would like to acknowledge and thank the Coast Salish people for allowing me on their traditional territory today. I would also like to thank the BC Treaty Commission for the invitation to participate in this conference on aboriginal self government options and opportunities.

For those of you who don't know me, I'll briefly tell you who I am. I am the administrator for the Ktunaxa/Kinbasket Tribal Council, which represents four Indian bands, Indian reserves of Ktunaxa people and one Indian band of an offshoot of the Shuswap people, the Kinbasket family.

We live in the beautiful southeast corner of British Columbia, in the Rocky Mountain trench. Our traditional territory is about 27,000 square miles and historically included portions of Alberta and the adjacent states of Idaho, Montana and Washington. We also have two communities today of Ktunaxa, one in Idaho and one in Montana. Our Ktunaxa language is referred to as a cultural isolate — a language unique to the world. It is one of 11 aboriginal languages in Canada.

I am the elected chief of our largest community: A'qam, also known as St. Mary's, which is located near Cranbrook. Like many First Nations, we elect Chief In Council and the community governments in turn govern our Tribal Council. I am the administrator for our Tribal Council, which administers a wide range of social, cultural and economic programs offering the usual range of government services. We also have the usual challenges of human capacity, fiscal constraints, downloading of government programs and a restrictive legislative framework common to most Aboriginal peoples.

I could go on with my description, but I know our particular challenges are not unique within Aboriginal communities no matter where we live. The topic of aboriginal self government is vast and there's a lot of ground to be covered. Today, I'll confine myself to speaking about the Ktunaxa concept of self-government, a description of the foundation of our society, the four pillars of our society, how we articulate our governance interests and a snapshot of our ongoing nation building processes.

I will also try to describe the evolution of our citizen consultation process, which plays a key role in all of this, and I'm told is considered to be quite innovative. Lastly, I'll mention the obstacles and political challenges that seem to be getting in the way these days. Our work in nation building —which equates in many ways to building self government — has been ongoing for many years now. Our discussions have been wide ranging and both internal and private and external and deliberate. Many of the panelists today have met with Ktunaxa peoples in some form or other related to self-government work, and it's really nice to see all of you again.

Our discussions have been somewhat more focused in the past three years since we have entered into substantive treaty negotiations. Right now, like the majority of aboriginal peoples who are involved in the treaty process, we are engaged in stage four, agreement-in-principle negotiations. Although for the past year our tripartite discussions have slowed to a virtual crawl due to the political challenges unilaterally imposed on our table by the British Columbia government.

I wanted to briefly mention the political challenges up front, because despite the political roadblocks we recognize that we still have to continue our internal work toward building effective self-government and to rebuild our Nation. The Ktunaxa concept of self government is really quite simple.

Self government means being responsible for one's self. The 'self' in self government are Ktunaxa in our case. That's all we're talking about. Like Aboriginal people all over the world we feel we have the right to be responsible for ourselves, but more importantly, we know we have the responsibility to be responsible for ourselves.

What makes a society? How do you recognize a society? We believe there are four main characteristics, four pillars, if you will, like the four directions. These pillars represent our land, our people, our language and culture and our governance structure. It's pretty the much the same the world over. When you threaten one of these, as we see in the Middle East, it leads to war. The ability to govern is the heart of any nation. In our contemporary world this is always the understanding: we all exist within a broader context that places limits on our internal decisions.

We, the Ktunaxa people have governed ourselves, followed our cultural beliefs and traditions since beyond time in memory. Traditional leadership roles and responsibilities have always been tied to a collective survival. Each citizen understands their role and value within their community and tribe and respects the role and the value of other citizens within their tribe.

Building on the individual's strength and knowledge is one of the foundations of our governance. However, our ability to exercise full governance has been limited by the relatively recent imposition of the *Indian Act*. The imposition has forced a great deal of difficult change and adjustment within the nation. This new system of governance is deeply flawed for our situation, and I argue it is flawed for all aboriginal people in Canada. New distributions of power and authority have created deep divisions within our communities.

One of the most difficult realities that we face is that our previous method of governance, the Ktunaxa governance has been largely lost through the legislated restriction of First Nations cultural practices within Canada. As we redevelop our governance system, we face an enormous challenge because we have to consider how to blend, first of all, our relationship with and within Canada and British Columbia. Secondly, community comfort levels and the new distribution of powers and authorities and expectations created under the last century of governance under the *Indian Act*. And lastly, elements of historical government structures and powers that have withstood the passage of time. We need to be creative on how we blend those three areas.

We recognize there are many challenges in developing governance methods to replace current governance structures within our communities. However, we have evolved and adapted through many upheavals and we are confident that we will continue to grow and change to meet these challenges. Before I begin talking about how we've approached the nation-building process, I'd like to describe our citizen consultation process, for much of our collective and collaborative work takes place within this citizen consultation process.

Under the new tripartite treaty process we filed our statement of intent in 1993, spent much of 1994 and 1995 getting ready to negotiate and finally by 1996 we're negotiating our framework agreement. At this time we had an administrative structure in place under the umbrella of the Tribal Council. We employed band treaty coordinators who worked out of the offices at the band level.

The treaty coordinators held family circles, community dinners, met with Chief and Council and worked a variety of strategies and approaches to build citizen interest and input into the process. But we discovered that amid the day-to-day issues and the priorities of each community, it was evident that treaty negotiations were being treated just like another program, no matter how worthy our work was.

Around 1996, we began holding what we now call nation meetings, sponsored by the Treaty Council Department of the Tribal Council. At a summer meeting held high up in the mountains the decision was made to reorganize our treaty department and transform it into a proper council. We wanted to make it more accountable to the citizens beyond the accountability of operating as a tribal department.

A ratification process for the future treaty was built by consensus. It began with a series of guiding principles which include, first and foremost, all citizens will have the opportunity to participate regardless of where they reside. The treaty process is a nation-driven process — all citizens will be consulted on all aspects of the treaty. All citizens will be well informed, all decisions will be made in the best interests of our land, resources, culture, language and the future of the nation.

Built into the ratification process is a very high goalpost. Ratification of the agreement in principle will require 60 percent plus one of all our enrolled citizens. Ratification of the final agreement will require 75 per cent plus one of all enrolled citizens over the age of 16. We recognized early on that with these targets we needed to build an all-inclusive process.

Our thoughts are that we need to move our people along in their understanding and common vision at the same time and the same pace as the negotiations. In this manner, when we get to ratification of the final treaty, if ever, our ratification process will be a formality as everyone will have been included. We recognize it is an idealistic goal, it will be difficult to achieve, but it is the Ktunaxa goal.

In January 1997, our new Treaty Council continued operations, we hired a treaty administrator, a communications and community liaison coordinator and other staff. We began to round out the negotiation team, added community liaison staff, expanded the lands and resources team. We hired an archivist, built more administrative capacity and began training a capacity building program that covered everything from principled negotiations to group facilitation skills for the team.

The treaty staff have outgrown two of their premises to date and are temporarily renting a former billiard hall in Cranbrook as their headquarters. A community education and citizen involvement process has evolved over this time. The Treaty Council sponsors community meetings in all five communities on a monthly basis. It's the forum to review treaty related documents, refine collective interests on topics and generally keep on top and review what's going on. There are also youth liaison workers who hold meetings with the youth, although their involvement is not limited to a separate forum.

We very much take to heart the message that we heard. It's almost two years ago now, since Stephen Cornell, co-director of *The Harvard Project on American Indian Economic Development*, first came and worked with our Tribal Council. At that time Stephen said "investment must not be thought of as just a financial investment, but as a human investment and our youth have to believe that they need to invest their life within our communities".

Within our nation we use another forum we call the Treaty Council. The Treaty Council meets on a monthly basis and membership is open to any citizen of the nation. The Treaty Council's role is to help guide the scope and pace of the negotiations. This forum is an opportunity to bring people together on a regular basis from all of our communities to discuss current treaty matters.

It gives people a chance to see and hear opinions from other communities. Through these forums we first built a respectful conversation and then we began to work on building a collective vision. From this common vision, we then built consensus for whatever the topic or issue we may be discussing. Of course, our internal views are then tempered and modified by the views and interests as a result of negotiating a treaty on a tripartite basis. And this is built into the citizen driven process also.

Our citizen-driven process took a long time to develop — it's not a perfect process and we are constantly refining and adjusting how we operate. We regularly use another forum as well, we call them nation meetings and they are held every three months, give or take.

We tend to use the Nation meetings for educational and information-related presentations, as well as breakout and facilitated group work sessions. The theme of our nation meetings over the past three years has been building tribal government and we continue to discuss the future government, constitution, citizenship and common vision for our Nation.

As I examined the speaker's list, I recognized several names in the cast of presenters. We've had John Graham, Claire Marshall's colleague, from the Institute of Governance at one of our past nation meetings, and of course we've met with Stephen Cornell and Manley Begay from *The Harvard Project on American Indian Economic Development*. We've also had presenters from the Nisga'a Nation, to inspire us with what they are doing, amid a wide range of other presenters.

We tried to lower or eliminate as many barriers as we can in order for our citizens to participate. We provide a travel allowance for our citizens to attend the Treaty Council meetings, and we also pay a small honoraria for the work done.

While this has proven to be a controversial topic within our nation, it represents a payment for work done. One of the continuing concerns with the treaty process is the fact that we are using largely borrowed money to negotiate a treaty, and we don't have the luxury of independent funding. We certainly don't spend big bucks on lawyers and consultants, as we're truly trying to build a treaty from the ground up.

Our nation meetings have become large events that attract anywhere from 200 to 350 people within our nation. We are a small tribe, about 1,500 or double that once we use our own citizenship code instead of the *Indian Act*, and to gather 200 to 300 people regularly is a remarkable feat. Within our territory there are only so many facilities that accommodate this large crowd for a two or three-day meeting, and that in turn leads to all kinds of activities, such as event planning. We provide daycare so, that again, to make sure that people have every opportunity to participate in the discussions. We plan social and cultural events at each of these meetings.

The price of building consensus for the future is a price...all of this activity is the price for building consensus for the future. It's the price for building tribal governance. We'd rather pay this up front than wait until it's time to ratify a treaty. It's not a perfect process by any means, we could employ 50 community liaisons workers rather than the seven we have at present, and still not everyone would feel fully informed.

We're dealing with complex topics, and as we continue through negotiations the topics begin to multiply.

Building our tribal interest papers take several months on average, as we review, consult and modify interests based on our community consultation process. To give you a bit of a hint of how difficult this process can be, I will relate one brief example.

When we began to build a wildlife interest paper, and wildlife is a topic that our people know a lot about, we thought this was going to be an easy one that we could start with. The discussions in my own community were pretty interesting. As our treaty workers began their community discussion they always needed a starting point, but need to balance having too much information on paper against not giving enough information. We need to let the information flow and build from a community level.

So when the wildlife discussion started, one of our citizens stood up and basically said: "Wildlife is not on the table. Do not discuss wildlife. I have a God-given aboriginal right to hunt any place and any time I want to, and I'm not going to give that up." Then he sat down. There was applause. Then his neighbour stood up and said: "The elk are in trouble, their habitat is being destroyed. We need to put a five-year moratorium on hunting elk." And we thought this was going to be an easy topic to start with.

It gave the community some pretty wide goal posts to begin their discussion and discovery of common interests. I can't help but get somewhat reflective and philosophical about our approach, for no one process or solution works well all the time in all or in any of our communities, for that matter. One of our resource staffers noted at a meeting one time: "The world is run by those who show up". Well that sounds like a good message. You want to have your say, you show up at the meeting.

As that message was repeated at another meeting, my son, Joe, stood up — and at 6 feet seven inches, when Joe stands up you notice him. He stood up and challenged that notion and basically said "We cannot, we must not allow to leave one citizen behind in the treaty process." This sentiment is captured and embodied in our ongoing capacity building work.

A parallel theme carried out by the Employment and Investment Department is nation building, one citizen at a time. Our employment and education specialists have been conducting individual and occupational training plans for every citizen who chooses to go through the evaluation process. It takes courage to go through the evaluation process.

So far, about one quarter of our citizens have been evaluated and have made subsequent life choices related to their future, their education, their career and their place within rebuilding our nation. It's been an awesome and an empowering process.

The capacity-building process is one of those over-arching activities that take place on a multiple level simultaneously. Communities, departments, programs and funding sources come and go, and the early bird truly does get the worm. It's all about building human and technical capacity — from land-based information systems that include state-of-the-art geographic information and traditional use database overlays, to drafting a new nation constitution.

The baton of Treaty Council governance has been passed on from the Ktunaxa/Kinbasket Tribal Council Chief's Council as a functioning department of the Tribal Council to a new and separate entity called the Treaty Council Financing Society Board. The role of this legally incorporated board is to help with administration, policy and personnel and to assure that funding is in place to carry out the work of treaty negotiations.

Overall, governance of the treaty department is controlled by members of the Treaty Council, not the elected body within the Tribal Council. Although the Tribal Council and community bodies are expected to bring their leadership skills to the table, the ongoing work of Treaty Council cannot happen independently of the rest of the nation-building work going on. It's a real challenge to integrate and coordinate all of these efforts and we're slowly figuring out how best to do that.

As negotiations continue to expand into more topics, the Treaty Council is slowly building greater departmental involvement in technical discussions, such as: building work plans that integrate work into the greater workflow of tribal business; working groups that deal with technical subjects; and other topics, such as governance or citizenship continue to work to build and implement various elements of our nation-building strategies.

Our main challenge is to ensure that the direction we move into has the full support of our citizens and our communities. As a leader for over 20 years, I am personally encouraged that our citizens are becoming more and more engaged in building our collective vision for the future. I said earlier that self government is being responsible for one's self.

A good example of the progression outside of the treaty would be in the area of child and family services and the delegated enabling agreement we signed in 1999 — a first step in pre-treaty implementation of governance jurisdiction and authority related to child welfare within our nation.

Readiness work and capacity building have taken place for many years and the agreement for delegation of provincial authority for child welfare services is occurring over several phases, and will eventually result in full responsibility to provide support and protection services for children and families. Although this governance authority will be reflected in one or more chapters of our final treaty, right now it's an agreement between our child and families services society and the provincial and the federal government.

Our work in defining our collective vision supports all of this work. Communities know what is best for our children and it is our children who are the future of our nation. This transference of governance, means that children will have safe, secure and culturally appropriate family and community experiences.

This parallel work conducted on a departmental or program level is an important element of our continuing preparation for implementation of a treaty. The results of our citizen consultation form the negotiating mandate for our negotiators. Negotiations are a process of give and take and we often have to consider other interests as we build our vision for the future.

There are many challenges ahead, and many mistakes are made along the way, but we must persevere, for treaty negotiations, according to our perspective, is really a process of rebuilding our nation.

I have to mention one important contradiction. At the negotiation table we say we are trying to build something new. This is supported by all three parties, building something new. Build a new relationship on a government-to-government basis. Yet, having said this and being committed to this principle, we are largely dealing with government who are not able to think outside the box. Government mandates often represent or reflect the existing statutory or regulatory status quo and there's not a lot of room to build either something new, something innovative or to allow space for cultural differences.

Having said this and considering that negotiations have been all but stalled for the past year due to the transition of a new provincial government and a related set-aside of negotiating topics, such as governance and jurisdiction, they are creating some critical problems. Ultimately we would prefer to negotiate rather than litigate.

I think current events should be considered to be a wake-up call for the British Columbia government. The on-going work of Treaty Council cannot happen independently of the rest of the nation-building work that is going on.

It's a real challenge to integrate and coordinate all of these efforts, and we're slowly figuring out how best to do that. Our people have seen many governments come and go over the past 125 years, and we're still here. BC's current approach to treaty negotiations and delegated forms of self government represent a dramatic shift in government policy and will present us with major challenges in the months to come, as we strive to continue to build a new relationship based on mutual trust and respect.

There is so much more that I would like to discuss. I particularly love to discuss economic development and our new $40 million St. Eugene Mission Resort, Casino, championship golf course — all that will open this summer and the golf course will re-open in April. But, I guess I'll save that for another day and another forum.

I just want to say that you have a standing invitation to come and visit us at St. Eugene and to come and golf at what *Golf Digest* has described as one of the best new golf courses in Canada. I guess *Golf Digest* is to be believed.

Edmond Wright, Nisga'a Lisims Government

Self Government — The Nisga'a Experience

Before the Arrival of the Europeans

The Nisga'a Nation exclusively possessed and occupied the Nisga'a Traditional Territory in the Nass Valley in northwestern British Columbia. We share a common language and culture. Nisga'a individuals and families belong to a tribe (Pdeek) - Eagle, Killerwhale, Raven and Wolf. As a member of a particular tribe, every Nisga'a belongs to a tribal house (Wilp). The Nisga'a Traditional Territory is divided into forty traditional domains (Ango'oskw) owned by sixty houses (Huuwilp). The traditional authority and ability to govern ourselves originates from the attachment to our land and natural resources, and the connection of families and communities to our traditional lands.

The Colony of British Columbia / The Establishment of the Indian Act

Although the Nisga'a Nation had first contact with European explorers at the mouth of the Nass River in the late 1700's, the effect of the newcomers was not felt by the Nisga'a until the establishment of the Colony of British Columbia, the Indian Act was enacted, and government surveyors started the formation of Indian Reserves. It was very alarming for the Nisga'a to be informed that the government was going to give them small parcels of land that had always belonged to them.

Nisga'a Land Question

The first Nisga'a delegation to protest the new arrangements travelled to Victoria in 1881. In 1886, Nisga'a Chiefs from Gitlakdamix removed surveyors from the upper Nass River area, and started the discussion on how to resolve the Nisga'a Land Question. Nisga'a and Tsimshian Chiefs travelled to Victoria to discuss the outstanding Land Question with Premier William Smithe in 1887.

The Nisga'a Nation established the Nisga'a Land Committee in 1890. In the discussions of the Chiefs, it was decided that in order to gain strength in their positions to resolve the land question, Chiefs would pool their traditional domains (Ango'oskw) into tribal ownership of the traditional territory. Nisga'a Chiefs were aware of the contents of the Royal Proclamation of 1763, had accepted the sovereignty of the Crown, and were prepared to take a moderate and reasonable position in the aboriginal rights they claimed. The Nisga'a position and description of the Nisga'a Traditional Territory formed the 1913 Nisga'a Petition to His Majesty's Privy Council.

Nisga'a Tribal Council

In 1949, Frank Calder was elected as a member of the Legislative Assembly in British Columbia. Mr. Calder was the first aboriginal elected in the provincial legislature. Through discussions with other Nisga'a leaders, Mr. Calder initiated in 1955, the establishment of the Nisga'a Tribal Council to play the role of the former Nisga'a Land Committee in resolving the Nisga'a Land Question.

At the conventions of the Nisga'a Tribal Council, authorization was given by the Nisga'a Nation to seek a declaration in the Supreme Court of British Columbia that the Nisga'a Nation had aboriginal title to the land and that their title had never been extinguished. The Nisga'a failed in the courts in British Columbia, therefore appealed in the Supreme Court of Canada. In 1973, the Supreme Court of Canada ruled that the Nisga'a held aboriginal title before the coming of the settlers, but the judges split 3-3 on the question of whether aboriginal title continued to exist. The seventh judge ruled against based on a technicality that the Nisga'a had not obtained a fiat.

After the federal government recognized that land claims had to be negotiated, they adopted a comprehensive land claims policy, and on January 12, 1976, Canada and British Columbia joined the Nisga'a Tribal Council in New Aiyansh to start the process of negotiating a resolution to the Nisga'a Land Question.

Soon after the initial session, British Columbia declared that they were observers at the Nisga'a table.

Finally in 1990, British Columbia rejoined the Nisga'a negotiations. When the Nisga'a entered into a tripartite negotiation framework agreement with B.C. and Canada, we already had negotiation instructions that were 77 years old, that is the statement in our 1913 Petition.

Tripartite Negotiations

Shortly before the 39th Annual Assembly of the Nisga'a Nation, on March 22, 1996 Canada, British Columbia and the Nisga'a Tribal Council signed the Nisga'a Agreement in Principle.

As we were in the process of completing details of the Nisga'a Final Agreement, on December 11, 1997, the Supreme Court of Canada handed down its decision on Delgamuukw. The Court expressed its view on aboriginal title, its protection by section 35(1) of the Constitution Act, what is required for its proof, and how it may be extinguished. Within its ruling, the court set out the test for converting aboriginal lands into use for economic development purposes. The Delgamuukw decision caused some delays in negotiations as everyone reviewed implications of ruling on existing treaty negotiations.

On August 4, 1998, the Nisga'a Final Agreement was initialled by Canada, British Columbia and the Nisga'a Nation in New Aiyansh.

The Nisga'a Final Agreement — Certainty

Up until the initialling of the Nisga'a Final Agreement, the Nisga'a Tribal Council had held forty one (41) Annual Assemblies of the Nisga'a Nation. Each annual gathering reaffirmed the acceptable terms for the resolution of the Nisga'a Land Question. The mandate of the negotiators was that the agreement had to be just and honourable, sustainable economically, that it respect our Common Bowl Philosophy, and that it include the inherent right to self government. The Nisga'a mandate also was clear that we would not extinguish or surrender our aboriginal title and aboriginal rights.

The model that Canada had used in the past was that the aboriginal nation had to surrender and extinguish their title and rights, and in return they would be granted crown title and rights.

To the negotiators, the mandate meant that we had to negotiate to have outright ownership of lands and resources, access to resources in the whole of the Nisga'a Traditional Territory, economic opportunities in all parts of our territory, cash, and the right to self government.

In the agreement, the Nisga'a Nation agreed that their aboriginal rights, including aboriginal title, as they existed anywhere in Canada before the effective date, including their attributes and geographic extent, are modified, and continue as modified, as set out in the agreement.

Lands and Resources

The Nisga'a Nation now own three categories of land.

Nisga'a Lands - 1996.4 sq. km
    Original fee simple title
    Nisga'a ownership of all mineral resources

Category "A" Lands - 25 sq. km.
    18 parcels of land
    Nisga'a ownership of all mineral resources
    Provincial crown fee simple title

Category "B" Lands - 2.5 sq. km.
    15 parcels of land
    Provincial crown ownership of all mineral resources
    Provincial crown fee simple title

Other parcels of provincial crown land were purchased by the Nisga'a Nation and various village corporations before the Nisga'a Final Agreement was signed.

As directed by our membership, the Nisga'a Nation owns:

- Nisga'a Lands and Category "A" & "B" Lands
- All mineral resources on or under Nisga'a Lands; and
- All forest resources on Nisga'a Lands.

The legislative house of Nisga'a Government has developed land acts that will accommodate progressive land holdings that start with a Nisga'a Village Entitlement, then to a Nisga'a Nation Entitlement, and then may raise title in the provincial land registry system. Our land registry system allows for dispositions such as leases, easements, licences of occupation, rights of way, etc.

The Nisga'a Nation was able to acquire two water reservations. The Nisga'a Water Reservation of 300,000 decametres of water per year for domestic, industrial and agricultural purposes. We also have a Nisga'a Hydro Power Reservation, for 20 years after the effective date, of all the unrecorded waters of all streams, other than the Nass River, that are wholly or partially within Nisga'a Lands.

Nisga'a fishing rights can be exercised in the whole of the Nisga'a Traditional Territory and the marine waters of Portland Canal and Observatory Inlet. The fishing area is known as the Nass Area that encompasses 26,838 sq. km.

The Nisga'a fish entitlements are held by the Nisga'a Nation, and the nation has the right to sell Nass salmon harvested in accordance with the Agreement.

The Nisga'a Fisheries Management Program was in place well before our Agreement in Principle was reached. Nisga'a data is used by Department of Fisheries and Oceans (DFO). Co-management with DFO of the fisheries is well established.

Canada and the Nisga'a Nation have joined to create the Lisims Fisheries Conservation Trust. Canada contributed $10 million and the Nisga'a Nation contributed $3 million to the Trust. Three Trustees are overseeing the Trust. One selected by Canada, one selected by the Nisga'a, and a third jointly selected by Canada and Nisga'a.

British Columbia and Canada each provided funding for Nisga'a participation in the general commercial fishery. Each government contributed $5.75 million, for a total of $11.50 million to enable the Nisga'a Nation to increase its capacity in the commercial fishery.

Hunting rights can be exercised in the Nass Wildlife Area that encompasses 16,101 sq. km. Designated species presently include harvesting of moose, mountain goat, and grizzly bear. Holders of traplines both outside and on Nisga'a Lands will continue to exercise their trapping rights in accordance with federal and provincial laws of general application. The Nisga'a Nation also have been given access to a Commercial Recreation Tenure in various areas of the Nisga'a Traditional Territory. We also presently own a fishing lodge known as Wilp Sy'oon Wilderness Lodge.

Existing forest licencees have been allowed a five year transition period to phase themselves out of Nisga'a lands. During the transition period, the aggregate volume of timber to be harvested is 725,000 m^3, of which 476,580 m^3 must be contracted with Nisga'a Logging Contractors.

Also, for a five year transition period, former Indian Reserves can be harvested under Indian Timber Regulations.

Pine mushroom harvesting each fall continues to be a large contributor to the Nisga'a economy.

Capital Transfer

The cash component of the Nisga'a Final Agreement is called the Capital Transfer. The amount agreed to is $190 million, to be paid to the Nisga'a Nation over a fifteen year period. We have also borrowed $50 million and agreed to repay the loan over a fifteen year period. The amounts are as follows:

Capital Transfer	$190, 0000	$280, 585, 307.40
Loan Repayment	$50, 0000	$84, 378, 757.08
Net Amount		$196, 206, 550.32

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The Nisga'a Nation has established the Nisga'a Settlement Trust and have committed that 50% of net amount of the Capital Transfer will remain in Settlement Trust for future Nisga'a generations.

Nisga'a Government

The Nisga'a Nation has the right to self-government, and the authority to make laws, as set out in the Nisga'a Final Agreement.

The Nisga'a Nation and each Nisga'a Village are separate and distinct legal entities. They act through Nisga'a Lisims Government and the Nisga'a Village Governments, respectively.

Nisga'a Constitution

The Nisga'a Nation must have a Nisga'a Constitution, consistent with the Agreement, which, among other things:

- provides that the Agreement sets out the authority of Nisga'a Government to make laws;
- provides for the role of the Nisga'a elders, Simgigat and Sigidimhaanak, in providing guidance and interpretation of the Ayuuk to Nisga'a Government;
- provides that in the event of an inconsistency or conflict between the Nisga'a Constitution and the provisions of any Nisga'a law, the Nisga'a law is, to the extent of the inconsistency or conflict, of no force or effect;
- requires that Nisga'a Government be democratically accountable to Nisga'a citizens, and, in particular, that elections be held at least every five years, and that all Nisga'a citizens are eligible to vote and to hold office;
- requires a system of financial administration and financial accountability comparable to standards generally accepted for governments in Canada;
- provides that every Nisga'a participant who is a Canadian citizen or permanent resident of Canada is entitled to be a Nisga'a citizen.

The Constitution is the supreme law of the Nisga'a Nation, subject only to:

- the Constitution of Canada, and
- the Nisga'a Treaty, which sets out the authority of Nisga'a Government to make laws

The Canadian Charter of Rights and Freedoms applies to Nisga'a Government in respect of all matters within its authority, bearing in mind the free and democratic nature of Nisga'a Government.

Nisga'a Government Jurisdiction and Relationship of Laws

Under the Nisga'a Final Agreement, Nisga'a Government has no exclusive jurisdiction. Nisga'a jurisdiction is always concurrent with federal or provincial jurisdiction. This means that for every Nisga'a law there is the possibility, if not the likelihood, that there is a federal or provincial law that deals with the same subject matter. Therefore it is necessary to include a rule that determines which law prevails if there is an inconsistency or conflict.

Generally, Nisga'a laws prevail when those laws deal with matters that are internal to the Nisga'a Nation, integral to their distinct culture or essential to the operation of their government or the exercise of their other treaty rights.

In some cases, Nisga'a laws must comply with provincial standards in order to be valid. If those standards are met or exceeded, then Nisga'a laws prevail.

In other cases, Canada, British Columbia and the Nisga'a Nation agreed that, while Nisga'a Government should have the authority to make laws, if there is a conflict, federal or provincial laws should prevail.

Finally, there are many subject matters over which Nisga'a Government has no jurisdiction.

Subject matters listed in the Nisga'a Government Chapter — Nisga'a laws prevail

Administration, management and operation of Nisga'a Government

Creation, continuation, amalgamation, dissolution, naming or renaming of Nisga'a Villages on Nisga'a Lands, and Nisga'a Urban Locals

Nisga'a citizenship

Preservation, promotion and development of Nisga'a language and Nisga'a culture

Use, management, possession, disposition of Nisga'a Lands owned by the Nisga'a Nation, a Nisga'a Village or a Nisga'a Corporation and similar matters relating to the property interests of the Nisga'a Nation, Nisga'a Villages and Nisga'a Corporations in Nisga'a Lands

Use, management, planning, zoning, development and similar matters related to the regulation and administration of Nisga'a Lands, including establishment of a land title or land registry system, designation of Nisga'a Lands

Use, possession, management and similar matters relating to the property interests of the Nisga'a Nation, Nisga'a Villages and Nisga'a Corporations in their assets other than real property on Nisga'a Lands

Organization and structure for the delivery of health services on Nisga'a Lands

Authorization or licensing of aboriginal healers on Nisga'a Lands, including measures in respect of competence, ethics and quality of practice that are reasonably required to protect the public

Child and family services on Nisga'a Lands, if Nisga'a laws include standards comparable to provincial standards intended to ensure the safety and well-being of children and families

Adoption of Nisga'a children, if Nisga'a laws expressly provide that the best interests of the child is the paramount consideration and that British Columbia and Canada are provided with records of all adoptions occurring under Nisga'a laws

Pre-school to grade 12 education on Nisga'a Lands of Nisga'a children, if Nisga'a laws include provisions for curriculum, examination and other standards that permit transfers between school systems, and for appropriate certification of teachers

Post-secondary education within Nisga'a Lands, if Nisga'a laws include standards comparable to provincial standards in respect of matters such as institutional structure and accountability, admission and curriculum standards

Devolution of cultural property (ceremonial regalia and similar property associated with a Nisga'a clan and other personal property having cultural significance to the Nisga'a Nation) of a Nisga'a citizen who dies intestate

Subject matters listed in Nisga'a Government Chapter — federal or provincial laws prevail

Use, possession and management of assets located off of Nisga'a Lands, of the Nisga'a Nation, Nisga'a Villages or Nisga'a Corporations

Public order, peace and safety on Nisga'a Lands

Regulation of traffic and transportation on Nisga'a Roads

Solemnization of marriages

Provision of social services by Nisga'a Government to Nisga'a citizens

Health services on Nisga'a Lands

Prohibition of, and the terms and conditions for, the sale, exchange, possession or consumption of intoxicants on Nisga'a Lands

Emergency preparedness

Subject matters listed in other chapters — Nisga'a law prevails

Timber resources and non-timber forest resources on Nisga'a Lands, if Nisga'a laws meet or exceed provincial standards (subject to transitional provisions)

Nisga'a Nation's rights and obligations in respect of fish and aquatic plants under the Final Agreement, if Nisga'a laws are consistent with this Agreement and the harvest Agreement and are not inconsistent with Nisga'a annual fishing plans approved by the Minister

Nisga'a Nation's rights and obligations in respect of wildlife and migratory birds under the Final Agreement, if Nisga'a laws are consistent with this Agreement and are not inconsistent with the annual management plans approved by the Minister

Establishment of a Nisga'a Police Board and Nisga'a Police Service, if Nisga'a laws include provisions in substantial conformity or compatible with provincial standards set out in the Final Agreement, and with the approval of the Lieutenant Governor in Council

Establishment of a Nisga'a Court, if Nisga'a laws include laws to ensure fairness, independence and accountability, and with the approval of the Lieutenant governor in Council

Direct taxation of Nisga'a citizens on Nisga'a Lands to raise revenue for Nisga'a Nation or Nisga'a Village purposes

Implementation of taxation agreements with Canada or British Columbia

Subject matters listed in other chapters — federal or provincial laws prevail

Sale, in accordance with the Final Agreement, of fish or aquatic plants harvested under the Final Agreement or the Harvest Agreement

Sale of wildlife or migratory birds harvested under the Final Agreement

Environmental assessment of projects on Nisga'a Lands

Environmental protection on Nisga'a Lands

Own source revenue administration

Composition of Nisga'a Government

Nisga'a Government is composed of:

Nisga'a Lisims Government;

Nisga'a Village Governments in the Nisga'a Villages of New Aiyansh, Gitwinksihlkw, Laxgalts'ap, and Gingolx; and

Representatives elected by the Nisga'a Urban Locals of Vancouver, Terrace and Prince Rupert/Port Edward to Nisga'a Lisims Government

Within Nisga'a Lisims Government there is a legislative house knows as Wilp Si'ayuukhl Nisga'a and the Nisga'a Lisims Government Executive.

The President, Chairperson, Secretary-Treasurer, and the Chairperson of the Council of Elders are elected at large by the Nisga'a Nation, and serve as officers of Nisga'a Lisims Government.

The Nisga'a Lisims Government Executive consists of all the Officers, the Chief Councillor of each Nisga'a Village Government, and one representative from each Nisga'a Urban Local.

Wilp Si'ayuukhl Nisga'a is composed of every individual who is an Officer of Nisga'a Lisims Government, the Chief Councillor and Councillors of each Nisga'a Village Government, and the representatives from each Nisga'a Urban Local. Today, the total membership of our legislative house is thirty-nine members.

Nisga'a Government Law Making

Since the Effective Date of the Nisga'a Treaty, May 11, 2000, Wilp Si'ayuukhl Nisga'a has had nine (9) meetings and has enacted thirty-two (32) Nisga'a Laws and passed a number of resolutions. Included in the thirty-two (32) Nisga'a Laws are seven (7) Nisga'a Statute Amendment Acts that have amended or repealed seventy-one (71) sections of various Nisga'a Laws, and added a schedule to the Nisga'a Lisims Government Act.

During Wilp Si'ayuukhl Nisga'a meetings, all members are able to make statements, participate in question periods, introduce petitions, raise urgent matters, and debate Nisga'a bills introduced.

Legislation is enacted by Wilp Si'ayuukhl Nisga'a when there is:

Introduction of the Bill;
Consideration of the Bill;
Final Vote of the Bill; and
Signing of the Bill by the President

A resolution to enact legislation may not be adopted until at least twenty-four (24) hours after the legislation has been given Consideration of Bill, except when the legislation is requested to proceed in a shorter time period.

After the enactment of Nisga'a Laws, Nisga'a Lisims Government Executive work with the Chief Executive Officer, four Directors and the Law Clerk in developing Regulations for the laws.

Listed below are Wilp Si'Ayuukhl Nisga'a meeting dates, procedures, resolutions passed and Nisga'a Laws enacted since May 11, 2000;

May 11, 2000

Swearing-In of Members of Wilp Si'Ayuukhl Nisga'a
Resolution passed - Rules of Conduct for May 11, 2000 meeting
Election and installation of Speaker and Deputy Speaker
Nisga'a Effective Day Procedures Act
Nisga'a Lisims Government Act
Nisga'a Interpretation Act
Nisga'a Citizenship Act
Nisga'a Elections Act
Nisga'a Financial Administration Act
Nisga'a Capital Finance Commission Act
Nisga'a Administrative Decisions Review Act
Nisga'a Personnel Administration Act
Nisga'a Land Act
Nisga'a Land Designation Act
Nisga'a Village Entitlement Act
Nisga'a Nation Entitlement Act
Nisga'a Land Title Act
Nisga'a Fisheries and Wildlife Act
Nisga'a Forest Act
Nisga'a Programs and Services Delivery Act
Nisga'a Offence Act

Resolution passed: Convene a Special Assembly of the Nisga'a Nation
Resolution passed: Establishment of a Rules Committee

September 13, 2000

Swearing-In of Chief Electoral Officer
Resolution passed: Standing Rules of Procedure of Wilp Si'Ayuukhl Nisga'a
Resolution passed: Nisga'a Lisims Government Executive membership
Nisga'a Statute Amendment Act #1
Nisga'a Temporary Housing Security Act

November 14 & 15, 2000

Swearing-In of Members of Wilp Si'Ayuukhl Nisga'a
Passing of the gavel from outgoing Chairperson, Nelson Leeson, to incoming Chairperson, Herbert Morven
Election and installation of Speaker and Deputy Speaker
Resolution passed - Wilp Si'Ayuukhl Nisga'a to meet on a quarterly basis during the 2001 annual session
Motion to adjourn to Committee of the Whole to hear a briefing and orientation session
Committee of the Whole - Briefing and orientation session
Wilp Si'Ayuukhl Nisga'a meeting reconvenes
Report of Executive Subcommittee established to select a Nisga'a Nation Flag
Resolution passed: Adoption of the concept for the Nisga'a Nation Flag

December 5, 2000

Resolution passed - Members and alternate members of the Council of Elders
Nisga'a Statute Amendment Act #2
Resolution passed - Appointment of Juanita Parnell as a member of the Nisga'a Valley Health Board for a term of four years
Resolution passed - Appointment of Harry Nyce Sr. to be the representative of the Nisga'a Nation to the Northern Native Fishing Corporation
Resolution passed - to examine the use of Pages in Wilp Si'Ayuukhl Nisga'a Chamber

April 24 & 25, 2001

Resolution passed — Adoption of design of the flag of the Nisga'a Nation, and that Nisga'a Lisims Government Executive take appropriate steps to provide for and regulate the proper use of the Nisga'a Nation Flag
Election of Code of Conduct Committee
Nisga'a Statute Amendment Act #3
Nisga'a Lisims Government Executive Alternate Representation Act
Nisga'a Highway Construction Act

July 25 & 26, 2001

Nisga'a Statute Amendment Act #4
Temporary Laxgalts'ap Forestry Loan and Guarantee Act
Prince Rupert Real Property Loan Act
Urgent Matter Debate — Drug and alcohol abuse, and violence in the Nisga'a communities
Motion passed: Development of a plan of action to combat drug and alcohol abuse, and violence in the Nisga'a communities

October 25 & 26, 2001

Resolution passed: Proposed Changes to WSN Rules of Procedure

Resolution passed: To receive Code of Conduct Drafting — Committee's preliminary draft and direct Committee to prepare final draft as per discussion during the Committee's report

Report from NLG Executive Standing Committee on Nisga'a Law & Order

Nisga'a Statute Amendment Act #5

Nisga'a Offence Amendment Act

Resolution passed: NLG Executive Meeting with Royal Bank of Canada

Resolution passed: NLG Executive to review Members' honorarium for special occasions

Resolution passed: NLG Executive to develop a system of honouring Nisga'a citizens, and erect a Memorial Monument for past Nisga'a leaders and veterans

Resolution tabled until next WSN session regarding the removal of a WSN Member

January 24 & 25, 2002

Report of the Chief Electoral Officer concerning tabled resolution regarding the removal of a WSN member

Report of the Code of Conduct Drafting Committee

Resolution passed to adopt portions of Code of Conduct, further review and amendment process, and date for code to take effect

Nisga'a Statute Amendment Act #6

Nisga'a Capital (New Asset) Finance Commission Act

Resolution passed: Final 2001/2002 Budget

Resolution passed: Removal of WSN Member

Notice of motion re: Capital Transfer distribution

March 12 & 13, 2002

Resolutions withdrawn: Audit review

Oral report on Code of Conduct

Resolution withdrawn: Allocation from Capital Transfer

Resolution passed: Training for members

Resolution passed: 2002/2003 Provisional Budget

Resolution tabled until next WSN session regarding the removal of a WSN Member

Nisga'a Statute Amendment Act #7

Urgent Matter Debate: Child and Family Poverty

Register of Laws

Nisga'a Lisims Government will:

Maintain a public registry of Nisga'a Laws in the English language and, at the discretion of Nisga'a Lisims Government, in the Nisga'a language;

Provide Canada and British Columbia with a copy of a Nisga'a law as soon as practicable after that law is enacted; and

Establish procedures for the coming into force and publication of Nisga'a laws

Relations with Individuals who are not Nisga'a Citizens

Nisga'a Government will consult with individuals who are ordinarily resident within Nisga'a Lands and who are not Nisga'a citizens about Nisga'a Government decisions that directly and significantly affect them. Non-Nisga'a will be provided the opportunity to participate in a Nisga'a Public Institution, if the activities of that institution directly and significantly affect them. Appeal and review procedures will also be available to non-Nisga'a who are resident within Nisga'a Lands.

Nisga'a Government may appoint individuals who are not Nisga'a citizens as members of Nisga'a Public Institutions.

Implementation of Nisga'a Laws

Nisga'a Lisims Government employs five senior administrators that have statutory responsibilities for the implementation of Nisga'a Laws. The administrators are:

Chief Executive Officer
Director of Finance
Director of Fish and Wildlife
Director of Lands and Resources
Director of Programs and Services

The Chief Executive Officer, Directors and their staff are responsible for the day to day functions of Nisga'a Lisims Government. In joint areas of responsibilities, Nisga'a staff work closely with federal or provincial officials.

Conclusion

The ratification of the Nisga'a Final Agreement by the Nisga'a Nation was an indication by the Nisga'a citizens that the model of the Nisga'a Treaty and its contents was a proper reconciliation of aboriginal rights and economic development. We believe that the modification of our aboriginal rights and the continuation as modified as set out in our Treaty was the proper approach to accomplish certainty.

Our tasks in economic development have just started under our new Treaty assets and authorities. We are insuring that our governments must be arms length from economic development and corporations formed to initiate development. We are also approving economic development funds to be available internally, and for partnering arrangements with neighbouring financial and training institutions.

As you can gather from this paper, self government requires a lot of time, effort and dedication, but it is very fulfilling to be able to develop and implement laws for the betterment of the Nisga'a Nation.

The Nisga'a Nation looks forward to a brighter future.

Edmond Wright
Secretary Treasurer
Nisga'a Lisims Government

Jim Abram, Union of BC Municipalities

Building Relationships Between First Nations governments and local governments

Good afternoon everyone. I have to say it's an incredible pleasure to be here today, but I also have to say it's extremely intimidating to sit amidst such a powerful group of speakers, such a distinguished crowd and such a fantastic building.

I also want to say that it's always so humbling for me to listen to First Nations people when I come to gatherings like this and each person comes forward, and they introduce themselves, and they speak in their native tongue and they thank the hosting nation.

They talk about their elders and their sense of being and their sense of place and the sense of time that they deal with. We, as white society, really don't have any of that, so it's very humbling and it makes me very envious that we don't have it. I just wanted to mention that.

So before I begin, with a bit of context — a quotation: "The treaty process should not be about what the federal or provincial governments are willing to grant First Nations through negotiation, but treaties should be a negotiation of what First Nations are willing to share with the rest of us."

Anyone here know who said that, except you, Dan? I did. It was at a meeting of the First Nations Summit in Cranbrook last year and I just had to tell you that this is what I believe in my heart and this is my personal feeling.

It has not in any way hindered me in building relationships — working relationships with all levels of government, whether they be local First Nations, federal or provincial. If anything, it's enhanced it. So I wanted to put that into context.

In preparing the notes for this conference it occurred to me that the question that was probably going to be on everyone's mind when it comes to thinking about local governments and aboriginal self government might be: d*o local governments really matter?* The short answer to this question in my view is yes, of course they matter. It was very difficult in preparing these notes to use the terms throughout 'local government' and 'First Nations government'. Throughout my comments I use these terms, but in reality, no matter what constitutional recognition exists or does not exist, both are actually a form of local government as opposed to being based in Ottawa or based in Victoria.

I want to thank Sophie for her comments, her very subtle comments about imposition of local government on First Nations — the delegated municipal model. I want to be real clear, I'm not in any way, shape or form suggesting that the local government model should be imposed on First Nations government. I wouldn't wish our problems on anyone.

We have our problems, we have our solutions, but we're continually working on it, it's evolving. I was quite disappointed to see that one of the eight questions that ended up in the referendum that I don't agree with had to do with the imposition of a local government model on First Nations. That didn't come from us. So, I'll just say, before I go any further, that there was this very conservative, conventional poet, singer from back in the 1960's by the name of Bob Dylan, and he once said "If you cut your hair short, all that hair grows inward and strangles your brain." Well, I just got my hair cut and I'm going to fall back on that excuse as necessary throughout the day if I say anything too outrageous. So there you go.

So self government is not only about autonomy, but it's also about connections. It's as much about self determination as it is about the formation of effective government-to-government relationships. Relationships with local governments will be important to First Nations for successful economic and community development.

In my remarks today, in keeping with the conference theme, which I don't think has changed since we started, I want to talk about the opportunities and the options with respect to First Nations local government relationships. I'll start by explaining why I think First Nations and local governments have much in common, perhaps now more than ever. Next I'll provide concrete examples of the type of work being done now to build relationships. I also want to touch on the challenging issues faced by First Nations and local governments in their working relationships and suggest some next steps for moving forward.

Despite all the differences in history and in culture, I believe First Nations governments and local governments have a lot in common; both provide needed and wanted services, economic opportunity and good governance for the communities they serve. Further, both are experiencing change in the form of a move toward greater autonomy.

Just as an aside, historically, neither of our governments — First Nations or local government — have been acknowledged by the feds or the province in the past, so we really have a common thread there.

For First Nations this move toward greater autonomy is happening through a variety of initiatives: trilateral, bilateral self government negotiations and legislative change initiatives like the *First Nations Land Management Act*. For local governments in BC this change is happening through a broadening of their powers provided by legislation. We have seen several years of legislative reform for local governments, culminating in the provincial government's proposed Community Charter, which is said to be a completely new piece of legislation governing municipalities. I can say that because I'm sitting on the Community Charter Council, it's getting frustrating after however many months it's been, we still haven't got it out there yet.

Anyway, under the Charter, municipalities will have broad, all encompassing powers to provide services to regulate and define spheres of jurisdiction and they will have natural person powers. This is the theory anyway, we'll see what happens when it finally gets out.

Part of this empowering vision for communities and the governments involves a new relationship with the provincial government based on open and regular government-to-government dialogue on issues that affect the public, both locally and provincially.

A draft of the Charter will be released shortly by the provincial government for public comment. The idea is for it to become law later this year. So I want to stress two points.

First, local governments and First Nations governments are experiencing change in a move toward more independent and autonomous forms of government. Second, this fundamental increase in powers drives both the need and the opportunity to create more robust intergovernmental relationships between neighbouring First Nations and local governments.

Through the 1990's, and continuing today, many First Nations local governments have taken up this challenge of improving the working relationships. In a moment I'm going to talk about a few specific cases as an illustration of the opportunities and the options that are out there. UBCM, that's the Union of BC Municipalities, has actively promoted and supported relationship building between local governments and First Nations through a number of initiatives, including a protocol agreement with the First Nations Summit, and a Memorandum of Understanding (MOU) with the Department of Indian Affairs, and co-sponsorship of the community-to-community forum program.

It's been a real pleasure for me to be part of those, all three of those actually, with many of my colleagues in this room.

The community-to-community forum program was developed in 1996 with the First Nations Summit and has been very successful in sparking dialogue between neighbours. Like this conference we're at today, the idea was to get community leaders together in a room to discuss shared interests and opportunities for action on common issues.

I'll take it that since imitation is a sincerest form of flattery, I think it's great that the BCTC followed suit with this forum over the last few years.

To date, funding for the community-to-community forums has been provided for more than 30 of the regional meetings between First Nations and local government elected leaders around the province. In addition, UBCM and the First Nations Summit are planning our third province-wide forum for July 11, 2002 right here in Vancouver.

At the previous two province-wide forums we featured speakers from local governments and First Nations who had a story to tell about their relationship and how working together on issues like economic development, servicing and capacity building had actually benefited their communities.

At the 2001 community-to-community forum, we featured the Campbell River First Nation and the Campbell River Municipality. It's been mentioned before, but I'll got into it a little further. The speakers then explained to us how the Discovery Harbour development which included a new marina and a successful shopping centre required their working relationship to grow and change and it continues to do that today. It's been expanding, evolving more and more opportunities have presented themselves and they've seized the moment and gone for those opportunities.

Among the benefits and the opportunities on their working together on this development was dispelling some of the myths about development on reserve lands. The hurdles and challenges they listed included the servicing arrangements that had to be negotiated, the design and access issues involved with the development, and the time commitment that was required.

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One of the most valuable things the Campbell River Indian Band and the Campbell River municipality told us was about the lessons that they learned from their experience. In order to promote business ventures that bring economic benefits to communities, they felt both lenders and future tenants needed to see working relationships —and formal agreements — between governing First Nations and neighbouring jurisdictions. So those folks really want to see people working together and know that it's a good relationship before coming into the community.

This is just one of the many examples of First Nations and local government learning to work together in new ways. You'll notice that economic development was the driver or the motivation in this case. The benefits to First Nations and local governments from economic development initiatives means that this is an area where relationship building often succeeds, and it may be why we focus on it as often as we do.

So what then are some of the challenges for local government and First Nations relationships? Well, for local governments, what I am going to say might come as any surprise. Increasing self-government powers for First Nations comes with intentions to improve economic opportunities — often through development on First Nations lands. That spells a need for land-use coordination between neighbours.

These three words can be at the root of much tension between local government and First Nations. A typical scenario is this: a local government fears development on First Nations lands because it may be incompatible with their own existing plans and beyond their capacity to provide for needed servicing. The First Nations in this case may fear that what local governments really want is control over the use of their lands.

In both cases, the fear is usually spurred by the fact that in many cases there is no established framework for sharing information, let alone consultation on the land-use planning. In cases where we have heard of local governments and First Nations overcoming these challenges, there is a framework for addressing land-use coordination issues — through an agreement such as a protocol or an MOU or a servicing contract or other means.

The Galagher Canyon master agreement negotiated between the Westbank First Nation, the Central Okanagan Regional District, the City of Kelowna and two water districts is another good example. The fact that there was so many parties working together, was quite an accomplishment. This agreement provided a high level of certainty on the use of the lands that were added to the Westbank First Nations reserve lands. The lessons learned by the parties, which they described at our 2001 conference were these. I'll just read them quickly.

First, good intergovernmental relationships are needed now — we cannot wait for the conclusion of treaties. MOUs are a good start in this direction. Time and patience are required to get the desired agreement, a common thread there with Campbell River's experience. Do not negotiate through the media. Understand each other's constraints and through good will individuals can make a difference.

So I think the next steps needed for local governments and First Nations to move forward together are to find creative solutions to these challenges. What we've learned over the past few years relationship building between local governments and First Nations is that there is still a lot of work to be done. The work needs to focus on opening up the range of options, tools and approaches available for First Nations and local governments to forge effective working relationships. I think the UBCM , with the First Nations Summit, can continue to do this. And, I think individual local governments with their First Nations neighbours will continue to do this.

A lot of work still needs to be done on developing options and approaches for resolving disputes. In other words, ways and means of addressing differences between communities as they arise. Although I haven't focused on it in this talk, I would note that we are only beginning to understand how the treaty process needs to play a role in defining relationships between First Nations and local governments. Hopefully it will be a positive way.

So in conclusion, I would like to say how positive I am about the future of First Nations relationships with local government. I'm confident that we have the creativity to find solutions to the most difficult challenges faced, like those in Nanaimo and other places. We have so much to gain. The benefits from effective working relationships are significant. They bring with them an environment where options flourish, allowing people to capitalize on opportunities of all kinds that will benefit their communities as a whole. They provide a way of addressing their differences when needed.

Kent McNeil, Osgoode Hall Law School

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Aboriginal Rights: The Legal Landscape in Canada

I am going to talk about the legal landscape of aboriginal rights in Canada. I'm sure that you all know that this is an enormous topic — to paint even a sketchy picture would take much more time than I have to speak to you this evening. So what I propose to do is to talk about the way the Supreme Court has been dealing with some of the key issues in aboriginal rights up to this point, and to point out what I see as some of the controversial issues that are going to be coming before the courts in the near future.

Since the *Van Der Peet* trilogy in 1996, we now have a clearer idea about what aboriginal rights are and how they can be proven in Canada. First of all, the Supreme Court in *Van Der Peet* itself laid down the test for identifying and proving aboriginal rights, other than title to land. The Supreme Court said this: "To be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right." The time for meeting this test is the time of contact or the time immediately prior to contact with Europeans.

I have a lot of difficulty with the *Van Der Peet* test. How does one distinguish, for example, between integral elements of aboriginal cultures and elements that are merely incidental and therefore don't give rise to aboriginal rights? Is the Canadian judiciary, made up as it is largely of non-aboriginal judges, really capable of making this kind of assessment? Doesn't the reliance on the historical moment of contact reveal the court's view that aboriginal societies are really static rather than dynamic? Isn't there a false dichotomy here between "aboriginal" aspects of aboriginal societies and "non-aboriginal" aspects that have been acquired through contact with Europeans? Isn't this really a frozen rights approach to aboriginal rights, even though Chief Justice Lamer denied that he was taking such an approach?

What about this magic moment of contact? What exactly does it mean and how does one establish it? Is it the first time aboriginal peoples met Europeans, as the Supreme Court seems to have suggested? Or does it involve something more? Does it require some kind of effective European control, as was suggested in argument in *R. v. Powley* (2001), which involved a Metis hunting right in Ontario? I think the Supreme Court is going to have to come back to this issue and clarify what is meant by contact. I think it will probably do that in the *Powley* case, which has been appealed to the Supreme Court.

While I think we are probably stuck with the *Van Der Peet* test where aboriginal hunting and fishing and those kinds of rights are concerned, in *Delgamuukw* the court distinguished aboriginal title to land and in effect created another test. In *Delgamuukw* this new test for proof of title to land involves proving exclusive occupation of the land at the time the Crown asserted sovereignty.

Occupation can be proven in two ways. First, by proving physical presence on and use of the land. Or second, by proving aboriginal law in relation to the land. The standard of proof of exclusive occupation is, I think, going to be one of the major issues in aboriginal land claims that come before the courts. In my opinion, every aboriginal nation in Canada should be able to prove aboriginal title to some land.

In the *Delgamuukw* case itself, Chief Justice Lamer suggested that some aboriginal peoples might not have aboriginal title because they were nomadic. But I doubt very much that any aboriginal people in Canada was truly nomadic in the sense that they wandered from place to place and did not have a definite attachment to specific areas of land. I think all aboriginal peoples in Canada should be able to establish such an attachment.

So in my opinion the real issue is not going to be whether a particular aboriginal nation has aboriginal title, but rather the extent of that title — the geographical extent of that title on the ground. This is going to depend on the standard of proof that is applied to establishing aboriginal title and the strength of the evidence. Regarding the standard of proof, there are some helpful indications in the Supreme Court's decision in *Delgamuukw*. For example, Chief Justice Lamer said:

"Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracks of land for hunting, fishing or otherwise exploiting its resources."

The Chief Justice also said that: "One must take into the account the group's size, manner of life, material resources and technological abilities and the character of the lands claimed."

While these statements are very much in keeping with common law standards for proof of occupation of land, at the same time I think the court was rejecting an ethnocentric approach. It clearly said that the manner of life of the particular aboriginal people has to be taken into account.

The terrain, the nature of the land itself, is another factor. You can't farm much of Canada, so aboriginal people can't be expected to have farmed it. Their ways of life often involved hunting, fishing, and gathering the natural products of the land.

So if an aboriginal people lived mainly by hunting, for example, exclusive occupation of definite tracks of land for that purpose should be sufficient to establish aboriginal title. In fact, in *Delgamuukw* Chief Justice Lamer acknowledged this expressly. At one point in his judgment — and this is where he talked about the inherent limit on that title, which I'll come back to in a few minutes — he said this:

"If occupation is established with reference to use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such use, for example by strip mining it...."

So if an aboriginal people proved exclusive use of the land as a hunting ground, then it seems that they would be able to establish aboriginal title in that way.

As I mentioned a few minutes ago, physical occupation is only one way to prove aboriginal title. The other way is through proof of aboriginal law. The Chief Justice put it this way:

"If at the time of sovereignty an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include but are not limited to a land tenure system or laws governing land use."

But how can law, which is really an abstraction, be used to prove occupation, which is a factual matter? I think what Chief Justice Lamer had in mind here was the exercise of legal control over land through law. In other words, he was probably referring to the exercise of jurisdiction in relation to land. This is important because it's an acknowledgment, in my opinion, that aboriginal nations not only had systems of law, but also had authority that is governmental in nature. Now I certainly believe this, but it's important to have the Supreme Court acknowledge this.

Their land rights are therefore more than just property. In *Delgamuukw,* the Supreme Court left aside the issue of self government, and limited its decision to land rights — to aboriginal title. But there are actually quite a few indications in the judgment that aboriginal title involves not just property, but also jurisdiction over land.

I'll come back to this issue of aboriginal jurisdiction or governmental authority in a few minutes. But first, I want to point out that this issue of sovereignty in relation to proof of aboriginal title is somewhat problematic. If aboriginal nations were sovereign at the time of Crown assertion of sovereignty, as I certainly think they were, how could the Crown acquire sovereignty over their territories without conquest, a treaty of cession, or other form of consent?

There is a major problem here that the Supreme Court just tends to avoid when it decides these cases. It has never really faced this problem directly, but if asked to do so I think what the Supreme Court would do is hide behind the act of state doctrine, which is what the High Court has done in Australia on this issue of sovereignty.

Simply put, when a court invokes the act of state doctrine, it denies that it has jurisdiction to decide a question. And typically, courts have said that they do not have jurisdiction to question Crown assertions of sovereignty. That's what the act of state doctrine is about in this context.

Now this does not resolve the problematic issue of the legitimacy of Crown sovereignty -all it means is that, if the court invokes the act of state doctrine, the issue can't be decided by that court. The issue doesn't go away. The question of the legitimacy of Crown sovereignty over Canada without conquest, cession, or otherwise obtaining the consent of the aboriginal peoples is an ongoing, problematic issue.

In applying the exclusive occupation test to aboriginal title, a court does, nonetheless, have to determine the date of assertion of sovereignty, because that's the date at which aboriginal title has to be established through exclusive physical occupation or through proof of aboriginal law in relation to the land. In *Delgamuukw,* the Supreme Court accepted 1846 as the date of Crown assertion of sovereignty, basically because that was the date that had been accepted at trial by Chief Justice McEachern, and that issue hadn't been contested or argued on appeal.

Well, why was 1846 significant? Of course that's the year when the United States and Britain signed the *Oregon Treaty* setting the 49th Parallel as the southern boundary of British Columbia from the Rocky Mountains to the Strait of Georgia. Well, that treaty was simply a bilateral treaty between two nations, the United States and Britain. It was not binding on anyone else because a basic rule of international law provides that treaties only bind the parties who actually enter into them.

So how could the *Oregon Treaty* establish Crown sovereignty over British Columbia vis-à-vis anyone other than the United States? It couldn't. The Gitxsan and Wet'suwet'en were not parties to that treaty, so I do not understand how it could amount to an effective acquisition of sovereignty over their territories. Nonetheless, that's what Chief Justice McEachern held, and as I said the Supreme Court didn't question that because the matter wasn't argued on appeal.

So I think this matter of assertion of Crown sovereignty and the date at which that occurred could be an issue in future cases, not just in British Columbia but elsewhere in Canada as well.

I now want to leave the matter of proof of aboriginal title and talk briefly about the inherent limit, before moving on to justifiable infringement of aboriginal rights. I'm picking and choosing here — I could talk about inalienability and some other aspects of aboriginal title, but as I don't have time to do so I'm going to focus for just a moment on the inherent limit.

In the *Delgamuukw* case, Chief Justice Lamer said: "Lands held pursuant to aboriginal title cannot be used in a manner that is irreconcilable with the nature of the attachment to the land which forms the basis of the group's claim to aboriginal title."

So the court placed this limit on aboriginal title and the uses that can be made of aboriginal title land. I think this limit was well meant, even though I think it was wrong-headed. It was well intentioned because the purpose of it, as the Chief Justice stated, was to preserve the land for future generations. But at the same time, I think it's paternalistic and could present a real barrier to economic development of aboriginal title lands.

It seems to me that the inherent limit is really another example of the Supreme Court's view of aboriginal societies as static rather than dynamic. Land uses that were relied on to prove aboriginal title 150 or more years ago can still restrict the uses that lands are put to, even though the aboriginal people today might want to put those lands to other uses.

There are other problems with the inherent limit that I just want to mention as well. Who has standing to invoke the inherent limit? Who can go to court and claim that an aboriginal nation has violated it? The Supreme Court didn't say anything about that. And why should the job of protecting aboriginal lands for future generations be up to Canadian courts rather than the aboriginal peoples themselves?

This inherent limit, as far as I know, appeared for the first time in *Delgammukw.* It didn't exist in Canadian jurisprudence before that – it seems that the Supreme Court just invented it. So I hope the judges will re-examine the issue when it actually comes before them and is argued more fully. My own view is that it would be more appropriate and probably more effective for limitations on use of aboriginal title lands to be put in place by aboriginal communities themselves through an exercise of their right of self government.

I now want to move on and say a few words about governmental infringement of aboriginal rights, including aboriginal title to land. Even though these rights have been constitutionally protected since 1982, the Supreme Court in the *Sparrow* case (1990) said that they can still be infringed if the infringement can be justified. In other words, governments can unilaterally infringe aboriginal rights without aboriginal consent, but they have to justify the infringement. Justification requires proof, first of all, of a valid legislative objective, and secondly, of respect for the Crown's fiduciary obligations toward the aboriginal peoples.

Now, it appears from the case law since *Sparrow* that the more extensive the aboriginal right, the more extensive the governmental power of infringement. In *Sparrow,* the court said that the aboriginal right to fish for food, societal and ceremonial purposes could be infringed for compelling and substantial reasons like conservation and safety. It didn't go beyond that.

Six years later, however, in the *Gladstone* decision, a commercial right was proven to take herring spawn on kelp for sale, and the court subjected this right to limitations for the purposes of economic and regional fairness, which included accommodating the interests of non-aboriginal groups in the fishery.

As Justice McLachlin, now Chief Justice McLachlin, pointed out in her dissent — and this was actually in the *Van Der Peet* case rather than in *Gladstone,* for reasons that I don't have time to explain — the infringement that the majority had in mind in *Gladstone,* namely, economic and regional fairness, was really an infringement of a very different kind than the infringements than the Supreme Court had in mind in *Sparrow.*

In *Sparrow,* governmental regulation of the fishery was allowable to preserve the resource — that's the conservation part of it — as well as to ensure that the aboriginal right was exercised responsibly. So it couldn't be exercised in a way that posed threats to the safety of other people, for example.

In *Gladstone*, the majority held that the right could be diminished, not just regulated but diminished, by allocating part of the resource itself to non-aboriginal fishers. This was pointed out by Justice McLachlin in her dissent in *Van Der Peet*. She found this approach of the majority to be inconsistent with the constitutional nature of aboriginal rights. I agree with that entirely, but it gets worse.

Remember that in 1999 the Supreme Court delivered its decision in *Marshall* No. 1, where it held that the Mi'kmaq Nation in the Maritimes has a treaty right to fish for a moderate livelihood. In its clarification, *Marshall* No. 2, the Supreme Court applied the *Gladstone* approach to a treaty right even though that right was internally limited to obtaining a moderate livelihood from the fishery.

Back in *Gladstone*, the court had distinguished *Sparrow* and *Gladstone*. It said that in *Sparrow* the fishing right had an internal limit because it was limited to fishing for food and ceremonial purposes, and an aboriginal group can only consume so much fish. The majority in *Gladstone* said that a full-blown commercial right has no internal limit, and so they refused to apply the same kind of priority. They said allocation and the interests of other users of the resource had to be taken into account.

In *Marshall*, the court applied *Gladstone* to a treaty right to fish even though the right has an internal limit — it is limited to taking and selling fish for a moderate livelihood. The court said the Mi'kmaq can't fish for full-blown commercial purposes or to accumulate wealth. Disturbingly, the court didn't even mention the distinction it had made in *Gladstone* between rights that are internally limited and rights that aren't.

Infringement of constitutionally protected aboriginal rights by governments is permissible, according to the Supreme Court, because the reconciliation of aboriginal peoples' prior presence in Canada with Crown sovereignty requires that aboriginal rights give way, in appropriate circumstances, to public policy objectives, which include such vague things as economic and regional fairness.

This brings me back to the *Delgamuukw* case and what the court said there about infringement of aboriginal title to land. I'm sure you are all familiar with the passage from *Delgamuukw* where Chief Justice Lamer said that, in the interests of reconciliation, the kinds of objectives that could justify infringement of aboriginal title include, and here I'm quoting:

"…the development of agriculture, forestry, mining and hydroelectric power, the general economic development to the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims…."

He even contemplated that governments could grant fee simple estates or confer licenses or leases for forestry and mining on aboriginal title lands without the consent of the aboriginal people in question.

What's wrong with this? First of all, the Chief Justice obviously thought that the province could infringe aboriginal title for purposes like agriculture, mining, forestry and so on, which are generally within provincial jurisdiction. At the same time, he said that aboriginal title is under exclusive federal jurisdiction, not provincial jurisdiction. Moreover, he also said that aboriginal title is protected by the constitutional doctrine of inter-jurisdictional immunity. Basically, this means that it's within the core of federal jurisdiction, and so provincial laws should not be able to impinge on it in any way.

So how can provincial laws infringe aboriginal title, especially to the extent that the Chief Justice seems to have had in mind in *Delgamuukw*? I'm really speculating here because this isn't clear at all in the judgment — there are a lot of contradictions in this part of *Delgamuukw* — but it seems that the Chief Justice thought provincial laws of general application relating to such things as the granting of fee simple interests, the conferral of leases and licenses for mining and forestry, and so on, could apply to aboriginal title lands.

As I said, there is a real division of powers problem here, but there is another problem as well. Provincial statutes that allow the conferral of those kinds of interests generally only apply to Crown lands. In other words, unencumbered Crown lands can be granted by the provincial government to create fee simple interests, forestry interests, mining leases, and so on. But the legislation generally does not allow the province to create those kinds of interests in privately-held lands. Where privately-held lands are concerned, the provincial government would first have to expropriate the lands under expropriation legislation. But expropriation has to be for public purposes like roads and airports — infrastructure, which was just one of the purposes that the Chief Justice said might justify the infringement of aboriginal title.

The creation of infrastructure would be a public purpose, but the creation of private interests for agriculture, mining, forestry and so on would not be. In Canada, private property rights are protected against those kinds of taking. And yet the Chief Justice seems to have envisaged that aboriginal title lands could be taken by the province for these kinds of purposes, even though aboriginal title lands are constitutionally protected, whereas private property interests in Canada are not.

Obviously, I have lots of problems with the Supreme Court's approach to justifiable infringement of aboriginal rights, in relation both to aboriginal title and to other aboriginal rights, such as hunting and fishing rights.

I now want to turn to the issue of self government. Of course the Supreme Court has not dealt with the issue of self government directly. It avoided it in *Delgamuukw*. It came closest, I guess, in *Pamajewon*, which was delivered in 1996, around the same time as *Gladstone* and *Van Der Peet*. In *Pamajewon*, the Supreme Court was willing to assume that there is a constitutionally protected right of self government. The court then went on to apply the *Van Der Peet* test, the integral-to-the-distinctive-culture test, to that right. In other words, to prove a right of self government an aboriginal nation has to meet the *Van Der Peet* integral-to-the-distinctive-culture test.

The result in *Pamajewon* was disastrous. The reason was that, instead of characterizing the right as a broad right of self government over aboriginal territories, as in fact had been claimed by the two First Nations who were involved in the case, the court said that the claim had to be restricted to a right of self government over the particular activity in question. In that case, the activity was gambling.

As the defendants were not able to prove that high stakes gambling — the kind of gambling that was involved here — had been integral to their distinctive cultures and regulated by them at the time of contact with Europeans, their claim to self government, and in particular to a right of self government in relation to gambling, failed.

The effect of the *Pamajewon* decision is that, to establish a right of self government in court, it will be necessary to meet the *Van der Peet* test with respect to every single aspect of jurisdiction that a First Nation claims. This is next to an impossible task — it's simply unworkable. There are nonetheless some hopeful signs that *Pamajewon* was not the last word on this.

In *Delgamuukw*, for example, the court said that aboriginal title is communal. As a consequence of this, the court recognized that aboriginal communities have decision-making authority over their lands.

In the *Marshall* No. 2 case, the court said the same thing about treaty rights: they're communal and aboriginal communities have decision-making authority with respect to their treaty rights.

In *Campbell v. British Columbia* (2000), Justice Williamson of the BC Supreme Court held that the communal nature of aboriginal title and the decision-making authority that aboriginal communities have over their lands must entail a right of self government in relation to their aboriginal title lands.

I find Justice Williamson J.'s reasoning on this to be compelling. Where aboriginal title is concerned, it may provide a route to judicial acknowledgment of the inherent right of self government that avoids the *Van Der Peet/Pamajewon* approach. Moreover, I think this reasoning applies with equal force to other aboriginal and treaty rights as well.

Then there's the Supreme Court decision in the *Mitchell* case just last year. This is the case involving a claim to be able to bring goods into Canada from the United States across the St. Lawrence River — it was the Akwesasne Nation of Mohawks who were claiming this — without paying customs duties. I found the decision to be quite disappointing in relation to the aboriginal right to trade. But that's not what I'm actually going to talk about.

Chief Justice McLachlin, in the principal judgment in the case, avoided the issue of self government, but Justice Binnie, in his concurring judgment, in fact spent a long time discussing it in the context of its compatibility with Crown sovereignty. I think this is quite important because it may be an indication of where the court might go in future decisions. Ultimately, he held that an aboriginal right to bring goods into Canada without complying with Canada's customs laws is in fact incompatible with Crown sovereignty.

So for Justice Binnie, some aboriginal rights — even though they might be established by meeting the *Van Der Peet* test — can't exist because they would have been cut off the moment the Crown acquired sovereignty. In other words, they were lost because they were incompatible with the Crown's acquisition of sovereignty.

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The good news for aboriginal peoples is that Justice Binnie did not regard internal aboriginal self government as being inconsistent with Crown sovereignty. In this respect, he referred to American law which, since the seminal decisions of Chief Justice Marshall in the Cherokee cases in the 1830s, has acknowledged the continuing inherent sovereignty of the Indian Nations. Moreover, the inherent sovereignty of the Indian Nations in the United States is not the piecemeal approach to sovereignty that was taken by the Supreme Court in the *Pamajewon* case. Instead, in the United States inherent sovereignty amounts to general jurisdiction, and it's only limited by its incompatibility with the sovereignty of the United States, or to the extent that it has been restricted by treaty or congressional act.

So I would like to end on this optimistic note: if the Supreme Court does in fact follow Justice Binnie's lead, it might acknowledge that there is space in Canada's Constitution for aboriginal governments that have general jurisdiction over their peoples and territories. The big question — or one of the big questions — would be what things are left out of that sovereignty because they are inconsistent with Crown sovereignty. There's some indication of this in Justice Binnie's judgment.

First of all, he clearly held that control over Canada's borders is essential to Crown sovereignty, and therefore an aboriginal right cannot interfere with it. Another one he mentioned specifically is military power - aboriginal peoples can't create their own armies. He also rather implicitly said that external affairs are things that are essential to Canadian sovereignty and can't be exercised by First Nations.

This still leaves enormous scope for an inherent right of self government. Also, in the United States, Congress has plenary power over the Indian Nations and so can and has diminished their sovereignty. There are very few limitations on this congressional power in the United States. In Canada, however, section 35 of the *Constitution Act, 1982* provides some protection to aboriginal rights that would include protection of the inherent right of self government. So there wouldn't be the same plenary power of Parliament in Canada to limit the aboriginal right of self government. Any such limitations would of course have to be justified on the basis of the *Sparrow* test.

So the problems that I talked about earlier, in relation to justifiable infringement of aboriginal rights, are quite relevant to the issue of self government as well. In a session this morning, the point was made that the provincial and federal governments in Canada need to hear the message that self government works, and that it would in fact be beneficial not just to aboriginal peoples, but also to Canadian society generally, for aboriginal peoples to have control over their own affairs and to exercise self government.

I think the same message has to be taken to the courts, because if the issue of inherent self government comes before the Supreme Court, the court is not going to make its decision solely on the basis of legal arguments. The court is going to be very concerned about the impact of any decision in favour of a general inherent right of self government. I think it would be very important for the court to hear the kind of evidence that Dr. Stephen Cornell gave us this morning about the benefits of self government, not only to aboriginal peoples but to society generally.

So if there are any lawyers in the room who are contemplating going to the Supreme Court on the inherent right, you might want to have Dr. Cornell appear as an expert witness so you get that information in at trial. Otherwise, it probably is not going to be heard by the Supreme Court.

I would like to end with that, but if anyone has any questions or comments, I'd be very happy to engage in a discussion.

Inherent vs. Delegated Models of Governance

Thinking outside the box

My presentation today, as indicated in the outline, discusses inherent versus delegated models of self government. I'd first like to thank the BC Treaty Commission for the kind invitation to speak today on a matter of huge importance to First Nations and other Canadians. In this vein, I'd also like to thank the Attorney General of British Columbia for helping me set up my talk by introducing the referendum questions three days ago, especially Question 6, namely whether or not aboriginal self government should have the characteristics of local government, with powers delegated from Canada and British Columbia.

I will not speak at length about particular examples of aboriginal self government as there will be four presenters following me who will. Additionally, I will not address the legal or normative rights arguments as to whether or not an inherent right to aboriginal self government exists, or ought to exist. This is a whole debate unto itself. Instead I'll focus on three fundamental questions.

First, what do we mean by inherent and delegated models of self government in a practical institutional sense? **Second,** are inherent and/or delegated models consistent with liberal democracy as practised in Canada and other western democracies? And **finally,** why does this matter?

A useful way to begin our discussion of inherent versus delegated models of governance is within the context of federal and unitary states. Among the approximately 200 states that populate the globe, Canada belongs to that anomalous set of states organized on the principles of federalism. Ninety percent of the states around the world are unitary states. The contemporary unitary state is a product in many ways of the French revolution. The old regime in France, as was the case of much of Europe, divided people on the basis of status. Peasants were subjects, not citizens, and the absolutist monarch was the embodiment of the state. L'etats c'est moi, underscored Louis the XIV of France.

The French revolution ushered in the modern era of citizenship and the notion of equality before the law. It followed that sovereignty emanated from the people who enjoyed the same legal rights equally. Sovereignty, therefore, of the republican state was unitary and undivided. Federal states such as Canada, to repeat, are anomalous and followed a different path. Sovereignty is divided among a central government and at least two or more regional governments. Canada as a federal state, of course, began with four regional governments called provinces, as well as a central government we usually refer to as the federal government, located in Ottawa.

At this point it's essential we begin to define some key terms. First is sovereignty. **Sovereignty** can be defined as the authority that overrides all other authorities. **Authority** can be defined as the right of command. Finally, **a right** is an entitlement. From this perspective we can think of sovereignty as a bundle of rights rather than a lofty abstract concept.

So just think of each of rights that make up the bundle as a twig or a tree branch, and each one of those twigs or tree branches entitles the holder to have power over something. Sovereignty in a unitary state is a collection of those, making decision-making authority over various areas, whether it's a postal system, whether it's health care or whatever.

In federal states, because sovereignty is divided between at least two orders of government, who has ultimate decision-making authority over what needs to be written down. Thus federal states possess, of course, written constitutions which divide sovereignty and concretely enumerates the respective powers or areas of jurisdiction. So we go back to our bundle of rights; in Canada it is divided out between the federal and provincial governments in section 91 and 92.

It's also important to note that federal states sometime permit concurrent law making. This occurs when one or the other level of government is able to make laws in the other's area of jurisdiction. If there's a conflict between the laws of the central and the regional government, the constitution typically specifies whose law prevails. This is called paramountcy. A final, albeit crucial feature of federal states, is the issue of constitutional protection of each order of government. In other words, neither order of government can unilaterally dissolve the other order of government. The federal government cannot unilaterally dissolve a province or provinces, nor can a province or provinces unilaterally dissolve the federal government.

Of course in Canada the federal and provincial governments are not the only governments that exist. One of the most significant of these is local government. Local government, as is often observed, are the creatures of the provincial governments. Local governments exist only insofar as provincial governments pass legislation to create them. The powers local governments possess, however broadly or narrowly defined, are determined by each respective province.

Constitutionally, the provincial government, for example, could make the postal clerk of Hudson's Hope the sole administrator for the City of Vancouver. Practically, of course, it is not likely to happen, though many of us in the north would delight in such an experiment.

In short, local governments have no constitutional standing, nor constitutionally defined areas of jurisdiction. They have authority, but it is delegated from the province. It is the delegated model of governance.

I'll go back to our sections 91 and 92. So the province delegates this, whatever subset of its authorities to local governments.

Does this mean, however, that local government is not important or ineffective? Hardly. Local governments provide critical services to citizens. They are catalysts of economic growth. And most importantly, they build community. However, the fact that provinces have a share of sovereignty and are constitutionally protected make them fundamentally different from local government in Canada. Is this the case in all countries? No. Germany and Russia, for example, both recognize constitutionally local government and thus have three orders of government.

Aboriginal self government. Against this background what do we mean by inherent versus delegated models of aboriginal self government? Notwithstanding the fears or comforts that the B.C. Government's treaty referendum question on aboriginal self government may invoke in some, it is very likely — and this is from their perspective, of course — the delegated aboriginal self government would differ from local government. To be sure, delegated aboriginal self government would have neither constitutional protection nor necessarily any areas of paramountcy. But, delegated aboriginal self government would almost certainly differ in regards to the number of areas of jurisdiction, as well as in the power that would likely span both federal and provincial areas of jurisdiction.

So we see the limited amount of delegated authority a local government typically has. What might be envisioned, even if there were negotiated delegated authority, a delegated model of self-government would span both and necessarily, I think, be more expansive.

What then is the inherent model? I take the inherent model to mean the third order of government model in the Canadian context. The third order of government exists if it satisfies at least two conditions: first, if it is a constitution-protected order of government, that is no other order of government, federal and/or provincial, can unilaterally dissolve that order of government. Two, if it has specified areas of jurisdiction over which it exercises ultimate, though not necessarily exclusive, decision-making authority. In other words, it has paramountcy in some areas of jurisdiction.

In some areas the Nisga'a model has concurrent law-making capacity with the federal and/or provincial governments. However, in some areas where it has concurrent law-making capacity, Nisga'a law prevails, should there be a conflict between the laws. This is consistent with liberal democracy as practised in Canada and other western democracies.

Critics of the inherent model of self government generally argue that the delegated model of self government is more consistent with Canadian political practice. Their criticisms usually are based on appeals to political equality, individual rights and practical workability. When I moved to B.C. nearly a decade ago I was surprised by campaign signs during one election that appealed "one country, one people, one law", in obvious reference to aboriginal rights issues in the province. This appeal argued for a Canada in which equality of rights should apply universally. It is one vision, a vision Trudeau attempted to realize three decades ago.

The history of Canada and the institutions that have emerged do pay special attention to the equality of rights. But Canadian political practice is more than that, and does recognize the rights of regional political communities in the form of provinces, language rights, religious rights, among other collective rights. To begin, as citizens of federal states we effectively have dual citizenship to Canada and to a province. Students in British Columbia have the right to access B.C. student loans, but students from Alberta do not, unless they become residents of B.C.

Quebec maintains its own civil code, in contrast to the rest of Canada. Roman Catholics in Alberta and Saskatchewan have the right to fully publicly funded Catholic education. Roman Catholics in British Columbia do not. In Canada, radio stations start with the letter "C", except in Newfoundland where they start with the letter "V". In Alberta a bank can foreclose on a house that is in arrears in payments and seize it, but the bank cannot also sue the owner. This is not true in other parts of Canada.

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Canada has never been about one country, one people, one law. Canadians cherish individual liberties, but they also cherish Canada as a community of communities. This is the essence of the Canadian federal experiment. Albertans don't want to see another National Energy Program and federalism affords them a degree of protection. For many this is seen as desirable, yet for some reason there is a reluctance to extend this principle to aboriginal Canadians.

I was once on a talk show with an MP from northern British Columbia. His political party supports greater provincial autonomy. I asked him about the east coast fisheries. I asked, wouldn't it be better if jurisdiction over the cod fishery were transferred to Newfoundland? After all, the people of Newfoundland had been there two or 300 years and the fishery is essential to their way of life. Wouldn't it be better for them to control their own future rather than some distant government? Why should the federal government, controlled largely by residents of Ontario and Quebec, make decisions on issues critical to the survival of Newfoundlanders? He completely agreed.

I then observed that the salmon fishery was also critical to the Nisga'a in British Columbia, and wouldn't it be better if they too had some control in the management of the salmon fishery? No, no, he argued, that was completely different.

To share sovereignty among political communities is existing and historical Canadian political practice. The realization of an inherent right of aboriginal self government is merely an extension of that practice. Why does it matter whether aboriginal self government is inherent or delegated? Having a degree of autonomy, independence and real authority, in other words some degree of sovereignty, are necessary though not sufficient conditions for successful economic development of aboriginal communities, Stephen Cornell told us yesterday.

A couple of centuries earlier the French thinker Alexis de Tocqueville observed in his travels across America how essential independence and authority of local government were to successful democracy, liberty and citizenship. Although First Nations are political communities in their own right, which is but one critical distinction from communities municipalities govern, First Nations typically are small communities and share that commonality with the New England townships de Tocqueville observed long ago.

I just want to read a few quotes from de Tocqueville that captures that essence:

> "Municipal institutions constitute the strength of free nations. Town meetings are to liberty what primary schools are to science. They bring it within the people's reach, they teach men how to use and enjoy it. A nation may establish a free government, but without municipal institutions it cannot have the spirit of liberty. In America, not only do municipal bodies exist, but they are kept alive and supported by town spirit. The township of New England possesses two advantages which strongly excite the interest of mankind; namely, independence and authority. Its sphere is limited indeed but within that sphere its action is unrestrained.The New Englander is attached to his township not so much because he was born in it, because it is a free and strong community of which he is a member and which deserves the care spent in managing it. Without power and independence a town may contain good subjects but it can have no active citizens."

Does this really require constitutional protection? Building political community is an unceasing endeavour. It requires long-term planning and huge investments of human resources. It is difficult to imagine long-term commitment to polity building without a reasonable degree of predictability that the institutions that will be built have reasonable prospects to endure. If a provincial or federal government has the authority to dismantle the powers of an aboriginal government, that predictability may be lost.

For many this may seem highly unlikely and therefore constitutional protection unnecessary, but I want to leave you with this one concluding thought. In a textbook written in the early 1990s, writing about different forms of power the authors observed:

"The government of Ontario has the power, that is the legal authority, to abolish the government of the City of Hamilton, but obviously it does not have the positional power to do so. If it tried, it would fail."

Today one might ask the residents of former communities surrounding Toronto, now the mega City of Toronto, whether the provincial government had the power to abolish their cities. In this context one can understand why some First Nations are not interested in the delegated model.

Jim Aldridge, Rosenbloom & Aldridge Law firm

Self Government: The Nisga’a Experience

The topic of this session is inherent and delegated models of governance and the Nisga’a experience. I prepared my notes with this question as a starting point: *Why are the Nisga’a government provisions included in the treaty rather than delegated through ordinary legislation?*

As everyone knows, the *Nisga’a Treaty* represents the culmination of the three parties’ efforts to agree on the content of the Nisga’a Nation’s rights that are recognized and affirmed in Section 35 of the *Constitution Act*. The treaty is based upon the premise that the parties did not have to agree on the detailed nature and content of a First Nations pre-treaty rights in order to reach agreement on the First Nations treaty rights. It exhaustively sets out the Nisga’a Nation Section 35 rights, including rights to land resources and, indeed, to self government.

The parties agreed that the Nisga’a final agreement would include certain law-making authority. In order to agree upon the subject matters over which Nisga’a government would have legislative authority under the treaty, though, it was neither necessary nor desirable to attempt to determine or set out in advance the subject matters over which the Nisga’a Nation had exercised authority as an integral part of their distinctive culture — to use the phraseology from the case law — at the time of contact.

Moreover, the Supreme Court of Canada has made it very clear that the claims to self government made in litigation must not be framed in what they call ‘excessively general terms’, or else they will not be cognizable — arguable — under Section 35. The Supreme Court of Canada of course made those observations in the *Pamajewon* case and reiterated them in its decision in *Delgamuukw*.

In other words, notwithstanding any general aboriginal right of self government that might exist, depending upon one’s view, any lawsuit seeking to enforce the right must identify the specific power sought to be exercised, and the First Nation will bear the burden of proving that authority over that subject matter was integral to its distinctive culture at the time of contact, in accordance with the *Van Der Peet* test. This is the burden that case law has placed upon the shoulders of First Nations and other aboriginal people seeking to establish self government.

If First Nations seek to establish a range of self-government powers through litigation, such as those set out in the Nisga’a Treaty, they will be faced with proving — and the Crown with defending — those claims, First Nation by First Nation, authority by authority, territory by territory and establishing the proper relationship of laws in each case. I suggest that this approach is quite properly rejected in favour of negotiation, under which the parties can agree to the appropriate law-making authority for a modern treaty without being faced with the burdens attendant upon the litigation process. It was similarly unnecessary and undesirable to determine the nature and extent of Nisga’a aboriginal rights to harvest fish or wildlife, or the nature and extent of Nisga’a aboriginal title to land. It was not necessary to agree about what the Nisga’a had, in order to reach agreement about what they would have in the future.

The agreement sets out the parties’ determination of what rights to lands and resources the Nisga’a should have in the future, despite any disagreement that might exist about the extent of their aboriginal rights. Similarly, the parties mutually determined the subject matters over which the Nisga’a should have authority, and the terms under which they would exercise that authority, despite any disagreements that might have existed between them about the extent of the inherent right of self government. In this way, agreement was achievable, and of course was achieved.

A consequence of this approach is that it was and is unnecessary to agree whether jurisdiction over a particular subject matter is the continuation of an *inherent* aboriginal customary or traditional authority on the one hand, as asserted by the Nisga’a, or an expression of a *necessary jurisdiction* as it might be viewed by the federal or provincial governments. Because the constitutional protection under section 35 for all law-making authorities as for other treaty rights is the same, it is irrelevant whether the source of a particular right or authority derives from the inherent right of self government, or whether it derives from the federal government or that of the province. The parties didn’t have to agree on that in order to reach agreement.

As you know, the provisions setting out Nisga’a Government authorities and responsibilities are included throughout the entire agreement. For example, the powers and responsibilities in respect of land are set out in the Lands chapter, those in respect of fish and wildlife set out in those chapters, and so on and so forth.

The *Nisga’a Treaty* clearly sets out each subject matter in respect of which the Nisga’a Nation may make laws, and for each subject matter it sets out the relationship between those laws and federal and provincial laws. It achieves a far greater degree of detail than could ever be achieved by way of litigation.

That's the background, but when considering the discussion now — particularly in light of the challenges that were brought against the treaty — it's necessary to distinguish between a number of related but distinct concepts. These concepts include **delegation, constitutional protection**, and the **relationship of laws.** These are related but distinct concepts. So let's start with delegation and the inherent right of self government.

This question, as Greg Poelzer [Chair, Political Science, University of Northern British Columbia] just went through, is a question about the source of the self-government powers: *where do they come from?* It's not a question about the extent of the powers, nor is it a question about the constitutional protection afforded to those powers. It's a question of where do they come from — what's the source? Now, pause to note, as we all know, this is of course the question now proposed to be asked in the new set of referendum questions announced by Attorney General Geoff Plant earlier this week. It's an odd question because in asking whether or not self government should be delegated — should be like local government delegated from the federal and provincial government— is literally a question about what do the citizens of British Columbia think the source of aboriginal self-government power should be. I'll come back to this.

I suggest that's not really what they think they're asking. What they really think they're asking is whether or not those powers should be constitutionally protected. But the question of delegation is not a question necessarily of constitutional protection, it's a question of the source. As Greg correctly said, delegated power is power given or assigned by some other authority. Municipalities exercise powers delegated by the province, territories exercise powers delegated by the federal government. The extent of the powers can be quite substantial or very limited. But the source of the authority is ultimately the Crown and Parliament, or the legislatures.

To say that First Nations have the inherent right of self government is to say that the source is somewhere else. It is to say that it comes from the First Nations themselves — that it is based upon their existence as organized societies in this country for thousands of years. It inheres in them as political communities. The source of the authority is their ancestral inheritance, and it pre-dates the arrival of Crown sovereignty. The inherent right of self government is a fundamental part of Canada's constitutional reality and, I submit, always has been.

Now, arguments have been made about that, of course, and the most current argument and the one that we were involved in, was in the context of the lawsuit referred to a few times yesterday brought by Mr. Campbell, Mr. Plant and Mr. De Jong when they were members of the opposition. And in the lawsuit, again referred to yesterday, the plaintiffs argued that there was no room for aboriginal self government because sections 91 and 92 taken together exhaust the set of all powers. Allow me to read from the conclusion of Mr. Justice Williamson's decision. And I emphasize — it's been mentioned yesterday but it's worth emphasizing again — what I'm going to read to you is the law of British Columbia today, and will remain the law of British Columbia until such time — unless and until — it's overturned by a higher court.

So in his conclusion Mr. Justice Williamson said the following:

[178] *The plaintiffs say that s. 35 of the Constitution Act, 1982, although it may afford constitutional protection to aboriginal title and to some aboriginal rights, may not clothe self-government or legislative powers with such status. They say this is so because any right to self-government was extinguished at the time of Confederation when the Constitution divided legislative power between Parliament and the provinces, leaving no powers for aboriginal people and their governments.*

In other words, they drew a little circle, just like Greg had up there, and they said in 1867 the fathers of Confederation got together and they had all these powers and they dealt them out — here's Section 91 powers for the federal government, here's Section 92 powers for the province — and the First Nations didn't make it to the party.

Oh dear, there's none left, they're all gone. Oops, we extinguished. We must have extinguished, there's nothing left. So if you're going to have any power it's going to have to be something that we dealt to the federal government or that we dealt to the provincial governments, and if they're going to give it to you, that's delegation. That's their argument.

Back to His Lordship's decision.

For the reasons set out above... — through the body of the decision — ...I have concluded that after the assertion of sovereignty by the British Crown, and continuing to and after the time of Confederation, although the right of aboriginal people to govern themselves was diminished, it was not extinguished. Any aboriginal right to self government could be extinguished after Confederation and before 1982 by federal legislation which plainly expressed that intention, or it could *be replaced or modified by the negotiation of a treaty. Post-1982, such rights cannot be extinguished, but they may be defined (given content) in a treaty. The Nisga'a Final Agreement does the latter expressly.*

That is the law of British Columbia. The right was not extinguished. The cards were not all dealt. Aboriginal people have the inherent right to self government. It is protected by Section 35, and it cannot be extinguished. The Supreme Court of Canada has said that the purpose of section 35 of the *Constitution Act* is to reconcile the prior presence of aboriginal peoples with the sovereignty of the Crown. Why should this reconciliation require aboriginal peoples to agree in their treaties that their only authority has its source in the Crown? Why should aboriginal people be forced to agree, as a price of entering into a treaty, that their only authority must originate from the Crown rather than their prior presence in Canada?

In any event, as I've said, the law of British Columbia today is that there is an inherent aboriginal right to self government. That legal fact cannot be changed by any referendum, or indeed by any provincial law. That's a question of source. But as I suggested earlier, what I think is really the issue — and having sat through and argued the litigation, what I know is the issue there — was not really the source, but rather the constitutional protection of the powers. The rights in the Nisga'a Treaty are recognized and affirmed by section 35 of the *Constitution Act*. This is a statement about the protection of the rights, not their source or content. But it is this fact that seems to give rise to some people's concerns. These concerns are not easy to understand.

Constitutional protection does not mean that the treaty provisions cannot be amended. Remember the phraseology during the debate: cast in constitutional concrete. The only thing that phrase has going for it is alliteration, not accuracy. An amending formula is included in the treaty. Of course the procedure requires the consent of the parties, but this should not mean, as has been suggested, that amendments will be impossible, or as difficult as some people have suggested. If there should prove to be a genuine need for an amendment, why should we not assume that the Nisga'a Nation would be as willing to recognize the problem as either Canada or British Columbia would be?

The proposal that the self-government provision should somehow be excised from the treaty and denied constitutional protection is really nothing more than a proposal that Canada or British Columbia should be able to alter the treaty unilaterally, without the consent of the Nisga'a Nation. This of course would defeat the entire purpose of the agreement. Certainly no one has suggested that the Nisga'a should have authority to unilaterally amend the treaty. It is impossible to perform such an excision. The self-government provisions are integral to all the chapters of the Nisga'a agreement.

For all of these reasons, during the negotiation process the Nisga'a Tribal Council, as it then was, consistently maintained that they would not enter into any treaty unless it included their rights to self-government, with the same constitutional protection for those rights as for the existing aboriginal rights that they had prior to the effective date, and the same constitutional protection that the remainder of their treaty rights will now have after the effective date.

Agreement on this essential point was one of the major elements in the Agreement in Principle (AIP) in 1996, and without it no AIP would have been achieved. It must also be recognized that it is a fact that the Supreme Court of Canada has ruled that rights protected by section 35 are not absolute. The court has ruled that aboriginal and treaty rights can be infringed, if the infringement is justified and consistent with the honour of the Crown. What will amount to justification for the infringement of a constitutionally protected land claims agreement has, thankfully, not yet been ruled upon and hopefully won't be. I say that, of course — people say, well, let's let the courts rule on it. Well, the courts won't rule on that until such time as a government purports to infringe a right in a land claims agreement, and the courts have to decide whether it's justified. But there is no doubt that the test for justification that the courts will develop and impose on modern treaties is no doubt going to be far more stringent than the test as it is applied in *Sparrow* and in other aboriginal rights cases. But the fact remains, the court has said that section 35 is not absolute.

Canada and British Columbia agreed to the detailed content of Nisga'a self government. They say that they are interested in negotiating agreements on self government that are not constitutionally protected. But why should either of those governments be able to infringe, alter or ignore their agreements in a way that they cannot justify, or in a way that violates the honour of the Crown? That's constitutional protection.

The third point that I'll speak on more briefly, but if people want to ask more about it later I'll be happy to address it, is the relationship of laws and concurrent jurisdiction — the question of which government's laws prevail over the others. Some people have raised concerns with the fact that in many areas Nisga'a laws will prevail over federal and provincial laws.

That's a separate question from source, and a separate question from constitutional protection.

As Greg Poelzer said, in the federal system, there's a rule. If the two governments each enact a valid law within their own area of jurisdiction, then if there's a conflict, guess who's law wins? Federal government laws win — this is the federal paramountcy doctrine.

Under the *Nisga'a Treaty*, all powers are concurrent, therefore there will often be areas in which Nisga'a laws and federal/ provincial laws deal with the same subject matter. A key part of the negotiations was determining which government's laws prevail in respect of each and every area over which Nisga'a Government has jurisdiction. Nisga'a laws prevail generally in respect of matters that are internal to Nisga'a lands and people, such as decisions about Nisga'a language, culture, lands and treaty entitlements. In some cases Nisga'a laws must comply with provincial standards in order to be valid. If those standards are met, then Nisga'a laws prevail.

Federal and provincial laws prevail over matters of broader application, such as peace, order, public safety, construction of buildings, health services, environmental protection. Some opponents of the treaty, and indeed the plaintiffs in the *Campbell* case, have said that if there's any inconsistency in laws, federal or provincial laws must always prevail over First Nations laws. That's part of what they mean by delegation, incidentally. What they say is, if there's inconsistency or conflict, federal or provincial laws must always prevail.

Why is this dominance so important? Why do they insist that First Nations must always be subordinate to federal or provincial governments? The Nisga'a agreed to concurrent or shared jurisdiction. But in respect of internal matters, this necessitated rules to prevent Nisga'a laws from being overridden by any number of federal or provincial laws enacted for general application. And these rules also provide the Nisga'a with protection against a future — or hopefully not present — federal or provincial government who might wish to interfere without justification in these internal matters.

So, to conclude, as I've said it is the law of British Columbia today that the inherent right to self government has never been extinguished. That's not a debating point any more. It is therefore constitutionally protected by section 35. The provincial government wants to negotiate treaties in which the inherent right is replaced by delegated powers. They want the source not to be aboriginal people themselves, but the Crown. They want to replace a constitutionally-protected right that First Nations have today, with one that can be changed by an ordinary act of legislation. They want to enter into agreements on self government that are not constitutionally protected, that the appropriate level of government can break, without showing a valid legislative objective and without having to show justification in accordance with the honour of the Crown.

I ask, why would any First Nation agree to such a thing? Ironically, of course, the entire issue of self government is a matter of federal, not provincial jurisdiction anyway. But of course, the province doesn't let that stand in its way. And of course the federal government, whatever other concerns people may have about its policy, does recognize the inherent right of self-government and is willing to include it in treaties.

People used to argue to us before the treaty that constitutional protection of land claims agreements or treaties is unnecessary. The argument went like this: The Crown will always honour its agreements. Governments will not set aside its contracts. Surely in light of recent events no one will make that argument any more. The Nisga'a have the constitutionally protected treaty right to self government, which reflects their aboriginal right to self government and continues it.

Other First Nations in British Columbia have the constitutionally protected aboriginal right to self government. Given this, is there any point in the referendum question asking whether this should be replaced by a delegated self government with no constitutional protection? Surely to ask that question is to answer it.

The plaintiff's case in the *Campbell* decision was that reconciliation could only proceed on the footing that Parliament or the legislature must be free at any time to infringe or nullify the exercise of any aboriginal powers of self government recognized by treaty without justification. This is a contention that, viewed in the light of our history and the development of our constitutional law, simply cannot be supported.

Graham Allen, Snarch & Allen Law Firm

The Sechelt Indian Band and Self Government

In my understanding, Sechelt remains the only delegated self government model that has been achieved through legislation in Canada, and it was actually accomplished in 1986. Clearly, there has been no momentum to follow that path.

I'd like to first start off by explaining why Sechelt approached its self government in this manner and just highlight a few of the watershed events that led them to self governance through legislation.

I think there were two propelling concerns for the Sechelt people as to why they very strongly wanted to be self governing. One was their urge to own their own land. Since I first met Sechelt, every single leader said "we want to own our land, we do not want Her Majesty claiming the title to our land". In fact, Sechelt showed me a document made in 1885 that was intended to represent to the federal Crown that Sechelt wanted to be able to hold land like the white man does.

The other part of that, and it intertwines to some extent, is the requirement by Sechelt that they be able to effectively manage their own land. Sechelt had the most leases and the most reserves in BC and a huge land management program underway. That was the capacity in which I first met the Sechelt people — looking at this large land base and how to manage it.

Sechelt for many years pursued delegated authorities under the *Indian Act*. One after the other Sechelt pursued everything they could, and by 1977 they had achieved every single power that could be delegated under the *Indian Act*. There was nothing left to give them and they were all alone in having all these powers. They found — and it wouldn't be much of a surprise to anyone in this room — those powers were completely inadequate for managing their lands. They just did not have enough to build an economy.

Sechelt had to start thinking about self government to achieve effective land management and find a way of becoming the owner of their reserves. This was a process that went on for many years and in the end, by 1982, we'd come up with this draft: the *Sechelt Indian Band Act*. I think it should be displayed in museums everywhere; it's about 200 pages, about 600 clauses. Everything you can think of is in there. We sent it to all the MPs and nobody was that interested. This was the era of companion legislation, Mr. Munro's efforts to achieve a companion act to the *Indian Act*.

So this was going nowhere and things did not look very promising, but in 1983, almost out of nowhere, the House of Commons appointed the Standing Committee on Indian Self Government. It became the special committee on self government — universally known now as the Penner Committee after its chairman. This committee went right around the country talking about self government, hearing from over 500 witnesses as to what aboriginal government should be, what it should look like.

The *Report of the Penner Committee* was unanimously approved in the House of Commons — a significant achievement in 1983. The conclusion was very important because it marked the watershed, in many ways, for what happened with governance afterwards:

"The Committee recommends that the federal government commit itself to constitutional entrenchment of self-government as soon as possible. In the meantime, as a demonstration of its commitment, the federal government should introduce legislation that would lead to the maximum possible degree of self government immediately. Such legislation should be developed jointly."

So those were the two recommendations: entrench self government in the constitution and have interim legislation for self government to the maximum level possible while we're waiting for that first objective to be achieved.

Sechelt, reviewing the *Penner Report*, produced its next concept, which was basically an opting-out act in which an individual First Nation could say we've had enough of the *Indian Act*, we want to opt out, there's a provision to do that, and we will now develop our own constitution and that will set out how we will govern ourselves — our institutions. And that was a proposal that received quite a lot of approval, but again it went nowhere.

And this is the amazing thing now when I look back on Penner. Jim Aldridge, lead legal counsel for the Nisga'a Tribal Council from 1980 to the signing of the *Nisga'a Treaty* in 2000, remarked earlier about the state of mind when the Penner Report was released 20 years ago. I guess we were all young and enthusiastic then because when I see what they recommended and how good it was and how valid it is today, it's remarkable that we have not advanced an inch since 1983, in either of those areas, with the sole exception that Sechelt managed to achieve its interim legislative step.

That, of course, and it's ironic enough, was achieved when the Conservative Government came to power and Sechelt were most fortunate David Crombie was the Minister. He was a man who was committed to trying new approaches to self government. He was very clear that, instead of making communities fit our legislation, we will make legislation that fits the community, et cetera. He said self government will be the process, not the end result. I believe he had it correct.

He also had, and a lot of people are always surprised by this, but we had Premier Vander Zalm in British Columbia who was a staunch ally of this process. Between the leadership of Mr. Crombie and Mr. Vander Zalm, Sechelt did achieve a federal Act and a provincial Act so that, by 1988, it was fully self governing with a delegated model.

Under that model, of course, it took title to its land, so it holds these 33 former reserves in fee simple title, and it has complete land management control. For those who talk about municipal-style government, it also has the ability of law-making in areas of education, health, child custody, social and welfare services for its own membership. These are province-level powers that Sechelt enjoys under this model.

Now, it's remarkable — or at least to me it's remarkable — that nobody followed suit, because I remember that when Sechelt did this there was a lot of discussion that, well, a lot of First Nations are going to want to do this, and none really wanted to, evidenced by the record. I think it's interesting to examine why that might be, and here are my theories on that.

Certainly a lot of energy went into the constitutional fight, the fight to have self government clearly spelled out in the constitution. That failed through the Charlottetown Accord and I think a lot of momentum was lost on that. But it's still there and that Penner Committee report is still there.

I think also a lot of the impetus for land management control went out the window with the *First Nations Land Management Act*, which is a very effective statute. I understand that about a hundred First Nations are trying to come under that legislation now, so it's significant. Under that Act, of course, a First Nation can carry out many of the land management functions that Sechelt wished to do.

I think finally a lot of the impetus for delegated self government has become confused by its role in treaty making in this province. Jim has explained what Nisga'a wanted out of treaty making, and I remember when Frank Calder came to Sechelt for the self-government celebration. He'd had a long debate with his friend the late Clarence Joe. They were great friends all their lives and Clarence had always said, Frank, you should have self government first and then a treaty, and Frank said, no, you should do them together. They always debated that point. They were both right, they both had different ways of achieving things.

But under treaty making, what we found out is that the province and the federal government are very insistent on a certain type of self government model being a prerequisite for getting a treaty. It becomes quite strange in terms of the different groupings. We know that some First Nations involved in treaty making are like Nisga'a: they want to be self governing and they want to negotiate that as part of the package. Others do not want to do that. I represented a First Nation that did not want to achieve self government through the treaty. Like everyone else it despised the *Indian Act*, but it said our people are not ready to be self governing yet, we need a period of 10, 20 years left under the *Indian Act*, but we do need the benefits of a treaty.

They were effectively told, if you don't take self government, you're not getting a treaty. These two are completely linked. Then we came to Sechelt and everybody thought, well, Sechelt is going to be easy, they've got self government. That's one of the major areas for negotiation dealt with, this should be basically a slam dunk to get through that. Instead of that, Sechelt, to its amazement, found that its own self government was put on the table by the province and the feds who wanted to make adjustments to it. Now, this was very strange and I must say I was quite taken aback when that happened.

We tried at Sechelt to fathom the reasoning for that. The chief made a public speech about this in 1997 in which we tried to say why would this be going on, why would the two governments suddenly come to the only self-governing band at that time — and this was before the *Nisga'a Treaty* was finished — and say let's change all this. As we surmised the situation, it seemed that the objective of the two governments was really a sort of Chretien White Paper policy continuing. That is to say, we don't want Indian reserves in British Columbia, we want all this land to be section 92. The federal government effectively wants to wash its hands of all of this, therefore this is what we're insisting on in the treaty; section 92 and you'll have these delegated models of self government and they will not be Indian reserves and they will not be 91(24) lands.

If that was the thinking, and I've certainly seen a lot of evidence that it was at that time, then Sechelt would end up as a complete aberration because Sechelt land, although it's not reserve, is provided for in the statute as being 91(24) land. So it would remain completely outside the rest of the scheme. So we faced serious attempts by the two governments to ask Sechelt to reconsider its form of self government, and in the end the chief basically had to tell both governments in a public speech:

"My people will not let you interfere with our self-government. It is not a question of being emotional as a patronizing provincial representative remarked at a recent side table. It is a matter of pride in what we have accomplished. We have no intention of going backwards."

A former Sechelt chief added:

"We have left the federal penitentiary. We are not going to walk voluntarily into the provincial penitentiary."

So that was a strongly felt position.

At the end, I believe we did prevail upon the governments to recognize that Sechelt self government should remain as it was through the treaty. It's an incredible business that all of that should have happened. But do remember that this was in fact the interim legislative step proclaimed by the Penner Committee and that Sechelt, like every other First Nation, was completely committed to seeing the constitutional right of self-government expressed explicitly, and that this was just within that context that all of this was achieved.

I was also asked for the limitations in Sechelt self-government. I think they're pretty obvious to anyone who reads it. There were two things the federal government insisted on that have always been a problem. One is to amend the Sechelt Constitution we have to seek governor-in-council approval. That's complete paternalism, but it's there and they would not budge on that one. If we could ever get a chance to go at that again I would really like to see that removed.

And of course the funding issue is always a nightmare for First Nations. It's a five-year funding arrangement. Every five years you go through hell and back in order to get the next few years agreed. I don't know if there's any answer to that funding question at all. I think every group has been through that.

So generally I'm trying to just think in terms of the Sechelt delegated model. Nobody has chosen to follow that, and I've suggested some reasons. Mr. Nault now is trying to deal with the *Indian Act* governance provisions in some form or another, and he's setting an agenda here. I must say, I think it's unfortunate that the agenda is being set by the Minister because in my dealings with First Nations I am not hearing that transparency and accountability and all these media buzz words are the issues of real concern. These are not what is going on on the ground.

So I really hope that this forum will be able to look at the governance issues that resonate within First Nations. I think that, for instance, looking at Professor Cornell and what he's saying, these are far more important issues for governance, how to create the environment for entrepreneurship. This is far more important than asking for accountability, for instance, from a chief and council who get elected for two years and get hounded night and day in the most democratic situation imaginable. I think that we would be better off ourselves focusing on is there a possibility of piggybacking onto the Bob Nault initiative provisions that might be opted into that would allow First Nations to achieve effective self-governance for themselves. That again would be in the context of recognizing the limitations of a delegated model, but at the same time understanding that overall we are within the Penner Committee scope that was just written after so many witnesses and such detailed hearings that this is legislation within the context of seeking constitutional entrenchment as the goal.

Dr.Tim Raybould

Westbank Self Government

I'd like to acknowledge the Coast Salish people on whose territory we're conducting this meeting, thank the Treaty Commission for their invitation, acknowledge the chief of Westbank and one of the councilors, Deanna Hamilton, who are here today and all the other people who have been involved in these discussions. Graham Allen is actually legal counsel for Westbank on the self-government agreement, and I'm sure during the plenary discussion that we can have a more informed debate about some of the issues between delegated versus inherent authority.

I think it was a very insightful discussion so far this morning on just how complicated it is between what you get with a delegated model and what you get with an inherent model and where the lay of the land sits, particularly given the various litigation regarding aboriginal title and rights.

But what I'd like to do today is talk a little bit about the *Westbank Self-Government Agreement*: how Westbank got to the position where it is today, what the agreement is about and how it fits in to some of the larger picture of treaty negotiations and to recent developments to re-empower aboriginal governments. I will also try and link *The Westbank Self-Government Agreement* back to some of the comments that Dr. Stephen Cornell [Harvard Project on American Indian Economic Development] made yesterday morning.

I think a lot of the elements that Dr. Cornell referred to yesterday that distinguish successful economic development amongst American Indian Nations are apparent in the Westbank Nation.

For those of you that are not familiar with Westbank, it's a small community with about 6,000 acres, 600 band members and 8,000 non-aboriginal people that live on Westbank reserves. The reserves are nestled between the growing town of Westbank, which was up 16 per cent this year, and Kelowna. Len Neviskowski, regional representative for the area, told me yesterday morning the town is still growing quite significantly — on reserve as well.

I think vision is really important. It was the fourth thing on Dr. Cornell's list. One of the participants yesterday mentioned to me how important it is to have vision. The vision at Westbank is to have a strong and accountable government to build economic opportunities based on what has already been achieved over the last 30 years, and to increase and improve the standard of living for all Westbank members. Westbank wants to ensure that they can build greater opportunities and an even stronger and healthier community.

Today, Westbank is governed under the *Indian Act*, like the majority of First Nations in Canada — an inappropriate legal framework for government anywhere, on reserve or off reserve. Jurisdiction is unclear, limited and weak. It's important to understand that, because it means that stability can be a problem. But, it has not been at Westbank. Successive chief and councils, as Chief Ely mentioned yesterday, starting when Westbank separated from the Vernon Reserve in 1963 under the first chief, Norman Linley, and subsequent chiefs, Ron Toosawaska and then Ron Derrickson, Robert Louie and then Brian Ely, have all, with their councils and the community, favoured an approach that looks towards creating economic development and opportunity as a way to break out from under the history of colonialism through the federal government.

Over the years, Westbank has successively looked at various ways to move outside of the *Indian Act*. But nonetheless, the *Indian Act* is still there. The community may have done all these things over the years, but the *Indian Act* is still the system of government. This means Westbank's government and its economic situation are too heavily determined by the actions of Ottawa, by the outcomes of elections, and personalities, and not the law, not the system.

While the government may run well under policy, it is still always in the back of peoples' minds that yes, the federal government could do something, or something could happen, the whole system could go for naught because of a change in the way in which the politics plays out. As a result of that, instability is created and that limits economic development and opportunity. So the community said, "how do we make sure that we have the stability?" Well, they said, what we'll do is we'll change the system of government out from under the *Indian Act*.

Aboriginal people have a right to govern themselves, but very few, for a number of reasons, are in a position to do so at present. A lot has to do whether with or not the federal government, the provincial governments have recognized the opportunities that First Nations have. I think Dr. Cornell's comments yesterday morning about the need to recognize that jurisdiction or sovereignty is an important aspect of allowing communities to make important decisions themselves about their futures.

So how did Westbank get to the point of having a self-government agreement? Because, Westbank does have a self-government agreement now that has been initialed and is waiting for ratification.

In 1970, when Westbank started looking at how it could improve their economy on the reserve, self-government options were examined. Westbank was a part of the advisory body that was set up to look at these options along with Sechelt.

During the 1980s, as Graham mentioned, there was some hope in the Canadian constitutional talks that self government would become a reality, but those talks failed. In 1988, the whole inquiry, which was a federal inquiry into the affairs of Westbank First Nation, both looking at the band government and the federal government, recommended that there should be changes to the way Westbank's reserves were governed. During the 1980s the chief and council at Westbank passed a whole series of community laws and codes that were to regulate activity, because there simply were no rules governing how certain economic activity would take place.

Also, the band assumed delegated authority for Section 53(60) [Canadian Constitution] and started to make some decisions under that authority that probably were not contemplated by the federal government, particularly when it came to rent reviews where there had been leases and rents associated with those leases that were very unfavorable to the First Nation. So, Westbank actually began to exercise jurisdiction.

When I first became involved with Westbank in 1990, a framework agreement had been signed to begin negotiating community-based self government with Canada. These were bilateral negotiations with Canada; it wasn't until 1998 that Westbank signed an agreement in principle. Again, during the 1990s there were constitutional talks with Charlottetown, and again there was a renewed hope that self government might get the constitutional recognition that aboriginal leaders had been aspiring to. That came to naught with the failure of the vote: the referendum on the *Charlottetown Accord.*

But, by 1999 and the year 2000, Westbank had finalized its agreement on self government. In 1999, an advisory council was established. The Westbank model is neither purely a delegated model nor one based on constitutional recognition. It's not a treaty. It's not going to be a treaty. But it's also not, in a technical sense, a delegated model because it's based on the premise that there is an inherent right of self government. I will discuss this further.

But because Westbank, under its self-government agreement, has jurisdiction that would have paramountcy— in certain law-making areas over non-aboriginals that live on the reserve — it was important to establish some body to hear from those people that would be affected by those laws, and also to advise on the property tax budget, which is the source of funding for which the services to the non-aboriginal people is paid from. So an advisory council was established and has been up and running since 1999. It is an interim body right now and it will be formalized once self government is approved.

In September of 2001 we had a self-government referendum at Westbank, and while 65 per cent of the community members voted in favour of going forward with self government, the vote did not receive the 50 per cent plus one of the absolute majority required to have it pass. That might be an item worthwhile discussing: what level of support is required for change, particularly when it comes to self government. It would be interesting to hear your views on that, given the requirements that are needed to make change and what's involved in making change. In May of this year Westbank plans to have the second self government vote.

In some cases Westbank has paramount authority over Canada and B.C., but at all times it's a concurrent model with Canada. So Canada has jurisdiction, Westbank has jurisdiction, but in certain areas Westbank's jurisdiction is paramount over Canada's. So in that sense it is similar to the Nisga'a model. Those jurisdictions include Westbank First Nation membership, wills and estates, financial management, lands and land management, landlord and tenant, resource management, agriculture, Westbank environment, culture and language, education, health services, enforcement of Westbank laws, licensing regulation and operation of business, traffic and transportation, public works, public order, peace and safety, and the prohibition of intoxicants.

Some of those jurisdictions only apply to WFN members; others also apply to the 8,000 non-aboriginals who live on the reserve lands.

Now, I'd like to discuss some key components of the self-government agreement. It's bilateral with Canada. The province monitored these negotiations, but they were not a party to them and were not involved in the negotiations. The lands at Westbank will remain reserve lands under Section 91(24) — reserves under the agreement. In this sense, the agreement is similar to the *Sechelt Indian Band Self-Government Agreement.*

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The agreement is distinguished because in the Westbank model title has not been taken to the lands, however, they still are 91(24) lands; they are still federal lands. This issue about whether or not lands after treaty settlement should be 91 or 92 or 35, is an ongoing debate.

From my perspective, what really matters is whether or not the First Nation has effective jurisdiction and control over its lands. I take the point that was made by Jim Aldridge [Council for the *Nisga'a Treaty* negotiations] that you've got to distinguish between the source of authorities, the constitutional protection and the powers that an aboriginal government has and where those powers come from. Self government applies only to reserve lands at this time. Self government is not a territorial model over the broader traditional territory that Westbank shares with its Okanagan neighbours; it strictly applies to the reserve lands or lands that become reserves in the future.

At Westbank there is significant private property on reserve, which is held by individual members. Most of the entrepreneurship and economic development on the reserve has not been spearheaded by the band government; it has been spearheaded by entrepreneurs within the band community.

Leases and other interests on Westbank lands will be protected under the current terms and conditions. This is very important when you have 8,000 people that are living on the lands and have invested under the security that they feel exists under the model of governance under Section 91(24) [Canadian Constitution].

Under the *Westbank Self-Government Agreement* the *Charter of Rights and Freedoms* will apply, and the *Canadian Human Rights Act* will apply — something that at a political level has been debated by aboriginal leaders. At the community level, there is a strong feeling that aspects of the *Charter of Rights and Freedoms* are very important to them as Canadians, as well as their rights as aboriginal people. So in order to ensure that the *Charter of Rights and Freedoms* takes into account the specific rights and freedoms of aboriginal peoples, as long as that was taken care of, the community is comfortable with having that charter apply.

The agreement is based on the premise that there is an aboriginal right to self government. This is key to the discussion that we are having this morning on inherent versus delegated models of government. While the agreement is based on the premise that there is an aboriginal right to self government, it is not a treaty. It is not constitutionally protected self government as found in the Nisga'a model.

Having said that, both parties — Canada and Westbank — view this agreement as being within the scope of what an inherent right could include. But, from the Westbank First Nation's perspective it is not the final word on self government. Westbank is one of six communities that makes up the Okanagan Nation. It has a degree of association with the Okanagan Nation, and the Okanagan Nation has certain rights and powers by virtue of being the body that holds aboriginal title. Consequently, when looking at self government tied to title in the context of trying to make improvements to the way band governments are currently operating, you have to be very careful about the relationship between the band and the tribe.

The *Westbank Self-Government Agreement* is an aspect of the inherent right, but it is not the full picture on the inherent right. That will come at some time, hopefully in the nearer future than in the long term, but we were very cognizant when this was dealt with. However, when looking at an agreement based on the inherent right of self government, the basis is the premise that the right of self government exists within Section 35 of the Canadian Constitution. What would happen if — in the worst case scenario — the government turned around and decided that it was going to repeal the Westbank self-government legislation? But, we have an agreement with Canada that is based on the premise that there is an inherent right. Our government has been working for a number of years and people are following the laws and it's smooth and it's there and we know inherent right exists in Canadian law. We know it exists now in British Columbia because of the case that Campbell brought against the Nisga'a.

What we would do at that point, as Westbank First Nation, if a government took away our right to self government based on our legislated model, is sue the federal government based on damages for changing our system of government, and argue to the court that the self-government agreement is within what is going to be determined as self government for aboriginal peoples. It may not be the full scope, but it is within what is generally regarded as being self government within Canada.

I was very taken by the comments last night by Kent McNeil, on Justice Binnie's dissenting opinion in *Mitchell*, because the broader sense of self government is there, and if you demonstrate to the court and you demonstrate to people that self government can work, and it does work, as Stephen Cornell talked to us yesterday morning, it makes economic development possible. It's not the only ingredient that needs to be there, but it's one very essential agreement.

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We could successfully argue that our model of self government should be bumped up to a constitutional level, or in fact it already is, or that the government has to reverse its actions. In terms of the political position and the strategy about thinking about delegated versus inherent, that's why we're comfortable with what we have in this particular agreement.

There is a precedent for it. In the 1980s, Canada took away the delegated authority of Westbank under Sections 53 and 60 of the *Indian Act* to manage its lands, and Westbank sued the federal government on the basis this caused hardship and economic problems. It was settled out of court. Section 53 and 60 authorities were reinstated and land management discussions began to look at ways to expand aboriginal control over land management, beyond 53 and 60. These discussions were the origin of the *First Nations Land Management Act.*

So as I mentioned, the agreement recognizes the Okanagan Nation. The community will pass its own community constitution, and the constitution is purely internal to the First Nation, so it does not require federal consent for amendment. As I mentioned, there's representation for the non-aboriginals through an elected advisory council. So I want to go through this next bit quite quickly.

The self-government agreement requires that there is a constitution, which outlines how those 17 areas of jurisdiction that I set out are controlled. It's the machinery of the aboriginal government. The constitution includes guiding principles, rules for membership, the duties and responsibilities of the council, how council elections take place, what happens at the council meetings, the council procedures, the procedures for enacting laws, conflict of interest guidelines, a detailed section on financial management and accountability and procedures for holding referendums.

Highlights of the constitution include that councils will be staggered for three years, on and off-reserve members can vote, anyone convicted of an indictable offense in the last 10 years cannot run for office and procedures to petition for the removal of a member of council. Under the constitution the council members have clearly defined roles and responsibilities, and must swear an oath of office.

I should comment on Dr. Stephen Cornell's point yesterday about being culturally appropriate. At Westbank there was significant debate about what the "machinery" of the government should look like and how much should be based on traditional notions of government and how much should be based on contemporary notions, and it's sort of a meld. But I want to make the point that process was gone through at Westbank.

Members of council are not permitted to miss more than three council meetings, and the meeting minutes must be available for inspection by all members. Laws: three readings must be presented to the membership in an assembly, and any law that would impose a tax on members must be approved in a referendum of the members. This is what I call the California clause. The constitution also includes the rules for membership. There are some basic rules for membership, and the community is still dealing with how it wants to see membership, or citizenship as it's known in other agreements. So consequently, with a year of self government coming to effect, there will be revisions to the membership code.

MacIntyre & Mustel, an independent pollster out of Vancouver, polled Westbank members on their views, priorities, and thoughts on self government. When asked to identify a main issue of concern, Westbank First Nation members cited accountability in leadership, aboriginal rights, economic development and respect — priorities all tied to vision.

Financial management is important to Westbank members, therefore, Westbank must have an approved budget that is brought to the membership, no expenditures if not budgeted, council salaries and benefits to be posted, yearly audits, restrictions on investment in borrowing and councilors that are personally liable if they make spending decisions that are not permitted.

I talked a little bit about the non-member representation, and there's a section in the agreement that says that where there is a law that will significantly affect non-members that law has to be brought before the body that is put in place by the non-aboriginal people to review that law. The advisory council is elected for three years, the members elect a chair and they advise on the servicing strategy. They establish their own electoral procedures and currently they meet once per month.

What about the bigger picture? With regard to treaty negotiations, I want to tie into something that Graham Allen [p. 47] mentioned: the package approach to treaty making where self government has to be a component of a treaty. When the treaty process was established aboriginal people, or First Nations people in British Columbia through the First Nations Summit made it very clear that self government had to be an aspect of treaty making.

But I don't think anybody expected the non-aboriginal governments to horse trade on self government in quite the way that they have been doing.

I think that is an incredible situation, when you consider what Stephen Cornell was saying. Here he is saying that one of the essential ingredients for strong aboriginal healthy communities is that communities have sovereignty or self government or jurisdiction, however it is characterized, depending on which side of the border the particular nation lives. They need that, that is required. That's an essential ingredient. However, in order to have that essential ingredient you've got to agree to other aspects of a treaty, or limit your self government in order to get some basic tools of governance that everybody else takes for granted.

So you can see the problem here, and I want to just relate to you an anecdote, something that happened during the process leading up to the Westbank first vote on self government. There was some concern within the provincial government that Westbank self government would somehow undermine treaty negotiations. Or that somehow the model didn't fit into — for reasons I guess that Graham had already alluded to — fit into what was being proposed or what was being characterized as the interests of the province and the federal government at treaty tables. And it was suggested that somehow self government at Westbank should not take place, or that it should be held out as a negotiating card until other aspects of the treaty, particularly land selection, other aspects to do with taxation and all these other areas, status of land, had been sorted out, worked through.

So it's almost like being held hostage to good government. Yet at Westbank for 25 years the community had been exercising governance beyond the *Indian Act* and wanting to make sure that it could solidify what it had accomplished and put that into place through its own governance. So you can imagine the concern that was expressed, not only by Westbank members, or people who worked for the Westbank First Nation government, the staff or the council, but also by the non-aboriginals that live on the reserve that wanted to see the system of government in place and secure so that that economic development, that future could be assured.

So when the provincial government started to try and question the self government it became rather disconcerting. I'm very glad that at the end of the day the provincial government decided, while not fully supporting the self-government agreement at Westbank, to not try and stop this important process. Because when you look at self government it's not a sexy thing, and it's not something that most people really like. Most people hate government. I mean, most non-aboriginal people hate government, and I would hazard a guess that a lot of aboriginal people feel the same way about their own governments.

People don't like government. That's a good situation to finish off on. So when you look at what is required to get through a referendum and to make that change, it really requires leadership and it really requires a sense of direction and vision. In that regard, the national institutions that are being proposed to work with First Nation governments to provide background, to provide support, is critical.

The very last thing I'm going to say is that when we look at the First Nation governance initiative — and there's people here that are knowledgeable and have been involved in that, including Minister Robert Nault who is going to be here at lunch — think about the aspirations that First Nations have for self government, self determination and the potential impact on treaty negotiations in British Columbia.

Allan Edzerza, Kaska Nation

Self Government in the Yukon

I'd like to begin by thanking the Coast Salish, and the organizers of this forum — the BC Treaty Commission. I'd also like to take this opportunity to acknowledge the other presenters for taking the time out of their schedules to be here and to share their wisdom. It's an honour to be invited to come and speak at a forum and to share my thoughts with you today.

I am working as an assistant negotiator for the Kaska Nation, which is a group of First Nations. There are five Kaska communities, two in the Yukon, three in British Columbia, that are in a conference of land claim process in Yukon, with transboundary agreements from the B.C. communities. We are in the British Columbia treaty process with three communities in B.C. where their conference of claim is. The two Yukon First Nations have a transboundary interest into B.C.

The BC Treaty Commission and the Government of Canada have acknowledged that the roster of early First Nations in the Yukon have a legitimate claim in the B.C. process. We are waiting for the province to also acknowledge them. Kaska also has a transboundary agreement negotiations underway into the Northwest Territories. It gives you a bit of an idea how complex a situation we're in, dealing with three jurisdictions.

I'd like to begin to talk about the Yukon experience by giving a quick historical perspective to what I'm going to say. This requires me to talk about the *British North American Act* of 1867. The amendment in 1870 that we refer to as the 1870 order, turned over the lands that were known as Ruperts Land and the Territories. The federal government was required to negotiate with the First Nations, deal with their interest, prior to opening it for development.

As we watched the treaty process evolve, it went west, it went east, but it stopped short of the Yukon. It's my belief that it stopped short of the Yukon because there was a gold rush occurring. The First Nations have been asking for treaty discussions since 1900. We watched the comprehensive claims begin in the modern era, pre-Niskapi, the Northwest Territories, Nisga'a and Nunavut.

When the Calder case was before the courts, the Yukon First Nations went to Ottawa and they tabled a document entitled *Together today for our children tomorrow* on February 14, 1973. The Yukon agreements were amongst the first agreements to be considered and accepted for negotiation by the Government of Canada.

An agreement in principle went forward, but the First Nations rejected it because it did not contain self-government provisions. I believe that that was the impetus for government to begin reviewing their comparison of claims policy that resulted in self government being added into the equation.

As we know, the Yukon final agreement is a document that's constitutionally protected under Section 35. But the self-government agreements that were concluded were not Section 35 protected; therefore, they would be considered a delegated model.

Four Yukon agreements came into effect February 14, 1995 — 22 years to the day after negotiations began. These 14 Yukon First Nations looked at three major elements for their final agreement: land, financial compensation and a bundle of rights. The land component included 16,000 square miles — 10,000 Category A, which is surface/subsurface; 6,000 Category B, surface rights only and 60 square miles of reserves and land set aside.

Out of the 14 Yukon First Nations, there are seven agreements in effect. An eighth agreement will come into effect on April 1. There are six remaining. We are working under a very tight timeline right now. The Minister of Indian Affairs, Robert Nault, has set an arbitrary deadline of March 31, 2002, to conclude all Yukon agreements or they're going to pick up their goods and walk away. That's the message he's given us.

I'd like to also point out something for this group. The Government of Canada recently proposed an economic development fund that is equivalent to the difference of 25.8 per cent of their total compensation, and the difference between their total loans. So the total loans right now in the Yukon have been approaching 40 to 60 per cent of their compensation. So the federal government came back with this offer. The 25.8% is the average of the first four that concluded that were invited to go ahead of the remaining Yukon First Nations.

We've heard a lot about inherent right versus delegated model. So what I'd like to do is point out the Yukon approach to it.

First, in the final agreement the land-based law-making powers are set out within the treaty, and if you want to look it up it's Chapter 5.5.0 of the final agreement. So, in effect, the Yukon First Nations have their land-based law-making powers protected under the constitution as part of their treaty.

The second thing I'd like to point out about law-making power with respect to the Yukon agreements is the very broad-based self-government powers. The agreements include four types of law-making powers. The first, 13.1 powers, are exclusive law-making powers. They are powers that deal with the right to make law with respect to their treaty agreement and treaty of rights that have been accomplished under the final agreement. To my knowledge this is the only other place where you'll see exclusive law-making powers to the federal government, which is really interesting.

Under the second set of powers, 13.2 powers, are programs and services of their citizens within Yukon. These are not limited to the traditional territory. These types of powers, of course, are dealing with things like education, social assistance and administration of justice. The third type of power, 13.3 type powers, are with respect to settlement lands. These powers, of course, are to provide how people will access or how they will develop or use their settlement lands. The fourth power is a concurrent power, and it's with respect to taxation. First Nations have taxation authorities on their settlement lands. I'll talk a little bit about taxation in a bit.

Going down this road did not require the First Nations to have a certainty clause put into this agreement. In fact, this agreement goes so far as to explicitly state that the aboriginal rights are not affected. Within these agreements there's also a recognition of the traditional practices in trying to bring the two together, contemporary and traditional.

We heard in the other inherent protected agreement that there is a requirement to talk about the *Charter*, and again, the *Charter* was not dealt with in this agreement. It's not required. When we look at the law-making powers of First Nations in Yukon, the First Nation laws are paramount over all Yukon laws. With respect to federal laws and the paramountcy question, there is an agreement amongst the parties that they must discuss those to see which laws will remain paramount. So it does not expressly state that the federal laws will be paramount.

The approach taken in the Yukon Agreement is to allow for First Nations to build capacity. We've heard this discussed at length at this forum: most First Nations need the ability to build capacity. When coming out from under the *Indian Act*, *Indian Act* bands must deal with jurisdictions and responsibilities that you did not have to deal with before.

Funding that's been provided to the First Nations in Yukon are unconditional grants, to the extent that they can be. To my knowledge there is only one term and condition that has been set on the funding, and that has to deal with social assistance. When providing social assistance you use the CHIST guidelines, which is basically a transparent process and ability to challenge, ability for appeal.

The financial transfer agreements in the Yukon are five-year agreements. The way the agreement works is that it's expenditures minus eligible revenues equals the transfer payment. The approach taken in Yukon with respect to eligible revenues is that there are no eligible revenues until you agree that they are eligible, and then they get captured within the agreement itself.

The self-government agreements that were negotiated in Yukon, we've got to remember, were done in an environment where Canada had not yet agreed to recognize the inherent right. So the First Nations, while I was involved in the process, were the Tr'on dek Hwech'in — the last agreement that came into effect. There was a process underway called the Inherent Right Process for Yukon. The parties, as they were saying, were trying to 'inheritize' this agreement. So the subject that came up that became very difficult to deal with was, of course, certainty.

Yukon First Nations felt that certainty provisions were difficult, because this agreement may not be the full basket of goods. The second thing that came up was that the *Charter* had to apply. So of course there was large discussions about Section 25 of the *Charter* and the notwithstanding clause.

The third thing that came up, of course, is the paramountcy of laws. When I said that the Yukon, the First Nations laws were paramount over Yukon, it's for any Yukon law whether it's been amended or not, and for any new law powers that they may acquire which they are currently trying to do as a result of devolution. Devolution is a process in the Yukon where the federal government is devolving provincial-like powers from the federal government to the Yukon government. So the rest of the land that's not taken up as settlement land will be moved over for administration and management by the Yukon government.

Some of the challenges of implementing self government in the Yukon include the capacity to enact laws, the regulations required as a result, and the capacity to manage land and resources. A big step and very, very time consuming and very expensive.

Financial capacity, as we were talking about, concerns audits that must be done according to public government guidelines, which requires asset management — something most First Nations don't do, and accounts receivable — a very expensive item, and something very difficult to get done in the Yukon.

There's the development of registry systems: registry of laws, registry of citizens and registry for lands. These are very large issues to be undertaking. It's been difficult to get transfer of programs and services from the Yukon government to First Nations largely because there's no database, there's no baseline data available.

And of course, there is an assumption of administration of justice. There's been negotiations for over two years that I'm aware of, and right now it looks like the approach that's taken is going to be very difficult to implement, because it looks like it's under-funded. And of course, if you get a system set up then you're into discussions about appeal back into the mainstream system.

Some of the successes of implementing self government in the Yukon has been the ability to access programs and services from the federal government. Currently all the *Indian Act* programs and services have been transferred in the most part, which would include direct and indirect funding. There's also the Medical Services Branch, all the aboriginal programs out of there, as well as the Northern Affairs program.

The other thing that's been quite successful in the Yukon is reliniquishing control of section 87 rights. In the Yukon agreements, of course, the First Nations sold that right and lost Section 87 after three years from the effective date. But what happens under the self government agreement is that First Nations also have the authority and jurisdiction for implementing tax. The federal government vacated 75 per cent of personal income tax for the first 10 years. They will vacate it up to 95 after 10 years. The Yukon government vacated 95 per cent immediately. The First Nations have enacted income tax laws and they have negotiated income tax collection agreements that are consistent with those that are done with provinces and the territorial governments.

The other success that I'm beginning to see is a willingness to enter into a governance forum where the First Nations, Yukon and Canada, politicians and bureaucrats will come together to look at ways to harmonize the various jurisdictions.

In closing, what I would like to do is spend just a couple of minutes to talk about the Kaska situation. Kaska's traditional territory is about 90,000 square miles; 45,000 square miles in the province of British Columbia, which represents, to what I'm told, approximately one-tenth of the province. If we are required to go down the road where we are not seeing similar government law-making powers and taxation powers, and dealing with this tax question in a similar way, then it's going to be very difficult for the Kaska to come together and rebuild the nation.

Kaska are currently in the process, like in northern British Columbia, I think in a very unique situation, and I suspect every First Nation can demonstrate that they have unique situations. But in this case we're dealing with the federal government on the Yukon side agreeing to these types of powers. But it's the same federal government that's sitting across from us in the BC treaty process. We're looking to British Columbia to have enough flexibility to allow the First Nations to achieve these goals, this vision — to allow us to rebuild as a nation.

We recognize that when you talk these types of traditional territories that it's different than down south, because we're talking much larger tracts of land. And the alienation is not nearly as severe as it is down here. In British Columbia the three communities, there are only three communities with a traditional territory. They are owned, for the largest part, 99 per cent by Kaska citizens. They are a people that live off the land, and so from our perspective it's quite different than being in a suburban area, such as the greater Vancouver area.

So a final comment is just to say that we have a very huge challenge in front of us to try to conclude these agreements, especially when we get these kinds of timelines. I would encourage you to look at this agreement.

Speaking Notes for

Minister Robert Nault, Indian and Northern Affairs Canada

Thank you. I appreciate this opportunity to address the *Speaking Truth to Power III* conference. The British Columbia Treaty Commission (BCTC) has put together an impressive agenda of speakers.

The BCTC has been a persuasive champion of the treaty process. Their recent report, *Looking Back, Looking Forward: A Review of the BC Treaty Process*, is a further demonstration of this commitment.

I want to thank Miles Richardson and his staff for producing this honest assessment of the current state of negotiations in British Columbia. The treaty and the treaty process is like anything else — it must evolve or die. Though we may have our differences about how to get there, everyone at the table agrees it must not die — it must evolve. The report is a good place to start.

We've learned a lot in the last 10 years.

Negotiating a variety of framework agreements, comprehensive settlement offers and agreements-in-principle has taught us all a number of lessons. We've come a long way, but we can do better.

The idea we can do better doesn't just apply to treaties. The government of Canada is reviewing the way we do business at Indian Affairs on all fronts. The Throne Speech made the commitment, and anyone who has read the papers in the last year, can't deny that things are changing for the better.

The Prime Minister is committed to a fundamental re-thinking of how we can help to improve the quality of life of First Nations.

Boosting our investments in First Nations economic development was the first thing I did. From $25 million to $125 million in less than two years. That investment has generated over $400 million in economic activity — jobs, experience and investment in First Nations communities. Real change, and real difference in the quality of life.

We have tried new approaches to old problems.

For instance, we have spent the last 12 months asking First Nations people what they think before we introduce governance legislation this year.

I am honoured to be working with people such as Vice-Chief Satsan on this project, and honoured to be working directly with First Nations people themselves.

When we complete this work, governance legislation should make it easier to negotiate self-government agreements across the country, and once again, BC First Nations are at the table, leading the way.

We are also opening the *First Nations Land Management Act*. This will provide the First Nations who participate with the authorities to make better use of land and resources. With this in place, I think we can move more easily to self-government agreements.

The goal is to ensure that all First Nations have the tools to move towards self government at their own pace.

And as we all know, self government is a critical component of treaty-making.

Settling land claims and treaties can unlock more of this potential. Throughout Canada, many First Nations are making the most of the land and resources gained through land claim and treaty settlements. They are partnering with non-aboriginal businesses and succeeding. And the benefits flow to both aboriginal and non-aboriginal alike — in particular in the rural and remote areas just like my own home in Kenora — where many First Nations are located.

Since the beginning of the treaty process in British Columbia, the business community has been clear about its concerns. Businesses want and need stability — whether they are on-reserve or not, whether they are aboriginal or not. They simply won't wade through the jurisdictional issues and the uncertainty surrounding the ownership of land, while bureaucrats and politicians consider their options. In a global economy, investment will simply move on to other places.

British Columbia has so many advantages: natural resources, a dynamic multi-cultural population, and a rich natural heritage. We can't allow them to lose because of uncertainty over Aboriginal land claims. It is unnecessary and costs First

Nations and other British Columbians.

As the provincial government goes forward with its referendum, it is important to remember why British Columbia chose the path of negotiation in the first place.

Over the years, governments and leadership have changed — on all sides of the table. New people bring new ideas and new perspectives — but the responsibilities remain the same: To work in good faith to build fair and workable treaties.

Treaties do not belong to one party. As one of the Chiefs near my home in Kenora likes to remind me, "This isn't just my treaty, this is your treaty too."

But I did not come here to discuss the referendum. I have made the federal position clear in the past.

We all made a clear commitment when we endorsed the recommendations of the BC Claims Task Force. And we followed up with a treaty process built on the knowledge and expectations we held at the time.

Today, eight years into the process, our commitment to the principles of the BC Claims Task Force is still there. But we must allow the process to evolve, as I said earlier. We must learn from our experience. On this, all three parties agree.

Looking back, I think it is fair to say that three patterns have emerged. First, several negotiations have reached advanced stages and the prospects for further progress look good.

Many tables face common issues. If we can bear down on these, we will see successful conclusions to these negotiations.

There has already been a positive trend — led by the BCTC — of exploring common issues encountered by various negotiating tables.

Although tough issues might still be on the table, we must focus on potential breakthroughs, not failure. We must focus on breakthroughs that build a sense of optimism in process.

A second group of negotiating tables are stalling because the sheer number and complexity of issues.

Again, we have to find ways of breaking these issues down so we don't stumble and lose momentum. We must concentrate on what we can do, not what we can't.

Where it is practical, the Government of Canada supports the idea of incremental, but determined, steps. Steps that contribute to governance and economic development. Steps that make a more immediate impact on the ground and ensure continued momentum towards a treaty.

If there is an opportunity to test-drive some of the new ideas — before the final agreement is constitutionally "locked in"— it can only build confidence. When we can show tangible results, we all win.

These tailored and incremental approaches must be developed with input from all three parties. They must reflect our collective objectives and expectations of this process.

Incremental measures will help to strengthen the commitment to concluding treaties, not water it down.

It is worth noting that in BC's only concluded modern treaty, the Nisga'a Final Agreement, there were a number of "incremental" arrangements that contributed to the successful outcome.

Prior to concluding the treaty, a Nisga'a School District and a Health Board were established, a post-secondary institution was initiated, and there was Nisga'a participation in park management and in fisheries stock assessments.

Appropriate incremental measures can play a significant role in developing experience and better human resources capacity to productively engage in treaty negotiations. Such measures can also contribute to a greater understanding within First Nation communities of some of the potential benefits that a treaty can provide.

Innovative and practical incremental measures can be an effective tool in making sure the treaty process meets the circumstances of individual communities.

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A third group of negotiating tables face a different set of challenges. Quite frankly, in these cases, the gap between governments and First Nations is too large to overcome at this time.

In this case, I have said across the country, there is no shame in taking a break.

Before I came to this job, I worked as part of a union. I've sat at the negotiating table myself and know how rewarding — and how frustrating — it can be. I also know that negotiating when you know there is no deal in sight is not very useful. It chews up resources, and good negotiators.

But the negotiating table is not the only place that progress towards a treaty can be achieved.

First Nations should have more options than this. They should not have to stay at the table, even when the prospect of success is remote. They should be able to step away, focus on other priorities, and pick up negotiations when they are ready. Improvements in quality of life, education, economic development, and governance can all help to prepare the ground for successful negotiations in the future.

I recognize that there are impediments for taking a "time-out" from negotiations, once they have begun. These should be addressed.

First Nations in some cases may want to build aspects of self-government incrementally alongside other incremental agreements relating to the treaty process. We must be willing to accept these tailored approaches where they are useful.

As I said, these are three general trends, but I know that every negotiation is unique. Flexibility is the key. Ultimately, individual tables must determine, in consultation with the BCTC, how the tools we develop can best be applied to their situation.

The Government of Canada is committed to this process and to improvement. We look forward to working with all parties as soon as possible to forge the way forward.

Already, senior officials from Indian and Northern Affairs Canada, the province, the First Nations Summit and the British Columbia Treaty Commission are examining options to make the process more results-based.

Defining the role of the BCTC in this changed environment will be a natural extension of this discussion.

None of us has a monopoly on the solutions. But I can assure you the Government of Canada is committed to exploring new tools with our partners that reflect the lessons we have learned.

Change can be difficult. But if we do this right, we can build on the successes, and avoid the problems we've had in the past. But the only way to do this is through honest and respectful discussions. Anything else, and the process will die.

A decade ago, there was a clear political, social and economic imperative for beginning treaty negotiations with First Nations. In 1990, for instance, Price Waterhouse calculated the cost to British Columbia of not settling land claims to be $1 billion in lost investment and 1,500 jobs a year in the mining and forestry sectors alone.

These facts are just as relevant today. But beyond this, there is a simple reason to move forward: it is the right thing to do.

Treaty-making should bring people together to look at the values and interests we have in common. We need to emphasize capacity building wherever it is required — in people, infrastructure, governance, economic opportunities, or treaties.

This is the best way to re-energize and re-focus our treaty process in British Columbia.

We have shown that not only do we want change, we can change, and we have changed. But we will only change in partnership with all of our partners. In the end, the treaty process may be different from what it is today. But there will be a treaty process, and there will be modern treaties. And most importantly, they will truly be our treaties.

Thank you for your time.

Tom Molloy, Government of Canada

Nunavut — Opportunities through Public Government

Let me start by making a couple of comments about the history behind the creation of Nunavut, because I think that there is a good deal of misunderstanding about the evolution of Nunavut and whether it is self government or not.

The concept of division of the Northwest Territories is something that goes back to the 1950s, so that pre-dates any treaty negotiations. In fact, the Diefenbaker minority government introduced a bill to divide the Northwest Territories into two territories — it was not the shape that Nunavut exists today — but nonetheless there was going to be division.

During the legislative process , the Diefenbaker government was defeated; there was an election and the Liberals took over — although both the Conservatives and the Liberals campaigned promising division. In the 1960s, Pearson appointed a royal commission to look into the question of division. Recommendation followed that no division should be made at that time, and that there should be further devolution of political power to the territorial government. Then in the 1970s, Trudeau appointed the Drury Commission to look into division again. So it wasn't until the 1980s that the possibility of division became a reality.

Once Canada got back into the treaty negotiation business in the mid '70s, the Inuit said that they would only negotiate a treaty if at the same time they could negotiate the creation of Nunavut. The federal government's position was that Nunavut was political, a devolution, and it was totally unrelated to any rights that might exist with respect to aboriginal rights and title. Eventually, however, the conditions changed and ultimately there was an agreement that there would be a linkage between the creation of Nunavut and the treaty.

When it came down to the final agreement, the government's condition was that they wouldn't create Nunavut unless the treaty was ratified. So, both parts of the treaty were ratified. But the impetus, toward creating Nunavut was enhanced during the negotiations. One of the major issues in the negotiations — and it ties into the governance issue — is that the Inuit were very concerned about the kinds of management regimes that would exist with respect to the lands beyond their treaty settlement lands. They were concerned that activities beyond such lands could adversely affect the lands that they identified as Inuit lands during the treaty process.

Originally the Inuit wanted to establish a series of boards that would be creatures of government, but would be the sole decision-making authority. The boards would be made up equally of government representatives and Inuit representatives with an independent chair, and charged with land use planning as one impact review. They also wanted a board that would be responsible for the management of Crown lands, and that these boards would have full and complete authority to make decisions.

As you might suspect, the government was not very keen about creating boards that would have full decision-making powers. They were prepared to create boards that would have an advisory role in terms of advising government with respect to land use planning, management and the like. So that was one of the issues that divided us for a number of years; the issue of how much power would these boards have.

Ultimately it was agreed that the treaty would provide a guarantee that there would be boards that would be called instruments of public government. In other words, the creation of a board and its responsibilities, functions, powers, objectives and duties would be set out in the treaty to function as instruments of public government. We also agreed, through negotiations, that these boards could have decision-making power, but that in certain defined circumstances the ministers would have the ability to override the decisions of the boards. But the discretion of ministers was limited. And in most cases there was a requirement that in changing a decision of the board there needed to be correspondence or contact between the minister and the board, and the ministers were required to provide reasons as to why the decision of the boards were being overridden or amended.

But as another important feature of agreeing to that, the federal government required that in the agreement there be an ability that the boards' functions could be modified or added to. In other words, the government didn't want to be forever in a position where it had to continue to maintain a number of boards in a variety of areas. So there were provisions, as I say, that additional powers, functions and objectives and duties could be given to the board. The federal government maintained the ability to coordinate the powers, functions, et cetera, with other institutions that operated adjacent to Nunavut. Furthermore, the federal government retained power to consolidate or reallocate functions of the boards, or to allow for consolidation of hearings.

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But in doing so, in any consolidation or reallocation, the government could not diminish or impair the combined powers, functions, objectives and duties of the boards, nor could it increase the power of governments or ministers in relation to those boards.

There were also a number of other conditions attached. For example, there was on agreement that the discreet function of planning policy, land use planning, screening of projects, and development impact review, would be retained as distinct functions. There were other conditions set out, including stipulations that governments could not reduce the level of public participation that had been established in the boards and the governments were required to ensure that membership ratios were maintained in any consolidation or reallocation. The membership ratios were set out as 50 per cent government, 50 per cent Inuit, with a chair appointed by the minister on the recommendation of the boards. The boards, though, are independent of the organizations that appointed them. There is an oath of office to serve the board in an independent fashion.

There was also a provision for a duty to consult on any changes that were made, including the ability to have an audience with the appropriate minister.

So thus we were creating a new type of relationship, a relationship that balanced rights set out in the treaty with the role of public government and public government institutions. I believe that the creation of Nunavut is a current example of a successful partnership in pursuit of the public interest. The federal government and the territorial government were able to share decision making in a new way.

As we all know, most governments are fearful or unwilling to discuss even sharing of decision making authority, or to limit the discretion of ministers. It's argued that this produces unacceptable levels of risk and can create degrees of uncertainty. However, in Nunavut the federal government, the Inuit, and the territorial government were willing to share some uncertainty and risk, and they found creative ways to find solutions, which would allow the common goals of each of the parties to be obtained.

I thought that it was interesting listening to the discussion this morning, and observing the patchwork quilt of governance arrangements that exist in British Columbia and also the various types of governance arrangements that are in place in other areas of Canada. In B.C. we have the Nisga'a model, the Sechelt model, the Westbank model, and others. Then, we have the Nunavut model, which, as I say, is not self government; it's public government, but as a result of a treaty, the Inuit have a role to be decision-makers in the public government process in a real way.

And I've wondered sometimes whether something like this could work in provinces such as British Columbia or others. I recognize that the model that exists in Nunavut would not work in British Columbia. Obviously it would be unworkable to have boards in each of the treaty areas. I know that provinces want to have province-wide processes, and indeed Canada wants to have national processes.

For example, in the Nunavut agreement we did not provide for a structure for federal environmental assessment because Canada argued, or we argued, that we needed to have a national approach to assessment and therefore we couldn't be limited by a treaty in a particular area. What we did, though, is agreed that the type of environmental assessment process that would occur in the north could not be less than the environmental assessment process that was existing at the time the treaty was ratified.

One wonders whether it would not be possible for Canada and the provinces to agree with powers, functions, objectives and duties that could be included in treaties, but leaving some of the details and flexibility to a public government. Whether First Nations in British Columbia, whether the Province of British Columbia or whether the Government of Canada would have an interest in such a proposal, I have no idea or such an idea. Whether it would facilitate or hamper negotiations, I have no idea. But it struck me that it's an interesting arrangement and an interesting type of partnership which, as I say, was developed in the north and it might well be something that could be looked at in other regions of the country.

I know from my negotiations in British Columbia that the same concerns about land activities outside of treaty settlement lands also apply and I'm also aware of the desire of First Nations to participate in decision making with respect to activities that occur off their treaty settlement lands.

So with that, I think I will close my remarks. I should say that the idea that I have put forward is my own and it's not a position of the Government of Canada, and therefore it's something only for consideration. But as I say, it represents a different approach to governance than has occurred in treaty negotiations to date, and it may well be another model.

I should also say it seems interesting that the different models that are presently in operation or potentially in operation in British Columbia — we have two anyway. There's the Sechelt Indian Band and the Nisga'a models — both different and yet they work within British Columbia. The fact that there are different governance forms does not seem to create a lot of confusion or difficulty that some of the people who oppose self-government arrangements suggest.

I said before the Nass Valley continues to exist and people continue to get up in the morning and go to work or school or go about their chores, and the world goes on — only it's being governed in a slightly different way. The same goes for Sechelt.

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Litigation and the BC treaty process

Some recent cases in a historical perspective

"I've read the Bill of Human Rights, and some of it is true."
— Leonard Cohen

By adding "in historical perspective" to my title, I know I have taken certain liberties in carrying out the task assigned to me for this conference. In my defence, I suppose I could say that it is unrealistic to expect a legal historian to stay in the present for very long. Or I could say that I have learned from experience that, when you are presenting on the afternoon of the second day of a two-day conference, most of what you wanted to say about current issues will have been said already. So you had better come up with something new (or, in my case, something old). But the real reason I have tweaked my topic in this way is that I think history is important. What is happening today has deep roots, and to a certain extent we are all playing roles that others have played before us, not just a few decades ago but more than a century ago. Indeed, only two blocks away stands the Marine Building, where the Allied Indian Tribes of British Columbia met in the summer of 1923 with the dominion minister of the interior, and then adjourned for five more days of intensive meetings in Victoria. They were trying to negotiate a settlement of the BC Indian Land Question, or at least to agree on a process for submitting it to the courts. In short, we have been here before.

The comments of the trial judge in a recent aboriginal title decision underscore this point. "For the Tlingits," he wrote, [t]he primary concern … is the road proposal. It will open up the heartland of the Tlingit territory for the first time, and therefore raises concerns about their ability to sustain the land-based economic, social and cultural system on which they collectively rely as an aboriginal people.[1]

Similarly, it was the economic and immigration "boom" of the first decade of the twentieth century, with its soldier settlement schemes and railway construction, that led to petitions, delegations and, occasionally, even violence. And for the first time lawyers, whose involvement with aboriginal people had until then had been largely confined to prosecuting and defending them in criminal cases, became involved. Not many — in fact, by the end there was only one. But the result was a twenty-year campaign for aboriginal title that ended only when parliament effectively put a legal end to it in 1927.

So I am going to try to link up the past with the present, and I will start by dividing the history of litigation and negotiation in the Land Question into three periods. The first comprises the 125 years or so from colonization to the Supreme Court of Canada's decision in the Nisga'a case in the early 1970s. The second covers the 25 years from then until that Court's ruling in *Delgamuukw* at the end of 1997. And the third is of course where we are now. Legally speaking, each of these three periods was defined by a distinct and fundamental disagreement between aboriginal people and non-aboriginal governments about the rights of the former that stood squarely in the way of negotiating treaties.

In the first period, the stumbling block was the very existence of aboriginal title as a legal concept and the ability of the crown to keep this question from being litigated. In the second period aboriginal title was conceded to exist as a legal concept but its content — that is, whether it was a true property right — was contested. And in the third the issue has, until recently, been whether the obligations set out in the *Delgamuukw* case apply *before*, as well as *after*, the aboriginal title of a particular First nation has been established by litigation. One by one, these obstacles — there are of course others - have been removed.

1. Aboriginal Title and the Sovereign Immunity of the Crown, 1849-1973

Historically, the issue in British Columbia for most of the past 150 years was not whether to litigate or negotiate aboriginal rights. It was whether aboriginal people were capable, practically and legally, of suing the crown, and whether the province would agree that there was anything to litigate or negotiate about. For most of this period — that is, from the creation of the colony of Vancouver Island in 1849 to the early years of the twentieth century — aboriginal people lacked the resources to engage in land claims litigation. And when they managed, around about 1908, to find a couple of lawyers who would assist them, they encountered a legal obstacle. Litigation against the crown was not only expensive. It was — because of the crown's sovereign immunity from suit — a privilege; and British Columbia would neither consent to be sued nor agree to have the matter of aboriginal title referred to the courts.

I think that the first document that specifically requested a judicial determination of aboriginal title in terms that caused Ottawa to sit up and take notice was probably the much-neglected Cowichan Petition of 1909. Drafted with the assistance of missionary Charles Tate, lawyer and priest Arthur Eugene O'Meara, and Toronto barrister John Murray McCheyne Clark, KC, it was presented by O'Meara to the colonial authorities in London, England in April of that year.[2] This document, and the considerable unrest in the Nass and on the Skeena at the time, ushered in a period of legal activity on the aboriginal rights front that was unmatched until our own day. Between 1909 and 1911 the dominion government of Sir Wilfrid Laurier commissioned a legal opinion on the issue of whether there was unextinguished aboriginal title in BC; responded to numerous other aboriginal petitions; and attempted to secure the agreement of the province to a court reference. Then, when it became clear that British Columbia would not consent to such a reference, Ottawa made plans to proceed in court unilaterally.[3] However, the Conservative Government of Robert Borden replaced Laurier and the Liberals in the autumn of 1911, and took aboriginal rights off the table.[4] One result of this move was the Nisga'a Petition to the British Privy Council two years later.

What was BC's position with respect to litigation? I think that the most succinct statement of it is contained in a draft letter dated 19 November 1910 from Premier Richard McBride to Prime Minister Laurier. A court decision in favour of the Indians, wrote McBride,

> would affect the title to all the land on the mainland … and more than half of the land … on Vancouver Island, and would have a most disastrous effect on our financial standing and would jeopardize the very large sums of money already invested in this province by English and other investors. I think you will agree with me that this is too serious a matter to be submitted to the determination of any court, however competent from a legal point of view. In other words, the considerations involved in this matter are political considerations and not legal question [sic] ... The Government of British Columbia therefore cannot agree to submit to a determination even by the Privy Council [of] a question of policy of such importance.[5]

McBride subsequently went to London, where he told the secretary of state for the colonies, the Right Honourable Lewis ("Loulou") Harcourt, that Britain's policy had to be "hands off British Columbia," and that the province would never alter its position on aboriginal title.[6] Although legally questionable even in 1911, this remained British Columbia's position for decades to come, and it prevailed in the face of both aboriginal petitions and the dominion's rather short-lived opposition. In 1927 an exasperated Ottawa finally reinforced BC's stance by having the dominion parliament amend the Indian Act to make it practically impossible for aboriginal people to retain lawyers to prosecute claims against government.[7]

Although land claims activity resumed after this restriction was dropped in 1951, the legacy of crown immunity was pointedly re-affirmed when the Nisga'a, after losing badly in the BC court of Appeal, managed to bring their case before the Supreme Court of Canada in the early 1970s. Although the Supreme Court ruled that aboriginal title is a part of Canadian law and split 3:3 on whether the Nisga'a still enjoyed such title, the Court dismissed their appeal. Four of the seven justices were of the view that, because the Nisga'a had not obtained the permission of the BC government to sue the crown, the case was not properly before the court — the same obstacle that had defeated the Nisga'a and the Allied Tribes forty years earlier.[8] And although this was its death rattle, BC argued that, because the technical ratio of the Supreme Court ruling did not deal with the merits, the Court of Appeal's decision — that aboriginal title can exist only if conferred by treaty, statute or agreement — was still the law of the province.[9] In the late 1980s the Court of Appeal emphatically repudiated this interpretation of the legal status of its earlier decision, but until then — and, indeed, even for a few years afterwards — BC continued to take the position that there was nothing to negotiate.[10]

But it would be misleading to give the impression that there were no treaty negotiations whatsoever in these early years. There were of course the *Douglas Treaties* that were made by the colonial authorities in the 1850s and there was *Treaty 8,* negotiated by the dominion at the end of the nineteenth century.[11] Less well known are the negotiations conducted between Ottawa and a number of provincial aboriginal groups, notably the Indian Rights Association, the Interior Tribes of British Columbia and the Allied Indian Tribes of British Columbia, between 1908 and 1927.

There was even a period in the 1920s when the senior dominion Indian Affairs official in the province believed that a settlement was only months, perhaps even weeks, away.[12] But these initiatives left most of BC unaffected, and the province took no real part in any of them. Eventually, Ottawa decided that it, too, would no longer contemplate or discuss making treaties in British Columbia or facilitate a judicial resolution of the dispute.

Why did this serious and dedicated campaign to settle the BC Indian Land Question, either through negotiation or litigation, fail? Three factors stand out. The first is the lack of unity among aboriginal people and of course their lack of political power.[13] They could not vote, they could not stand for election, they could not get their claim into court and their numbers had been declining since contact. The second factor is the intransigence of the province. And the third is the inability of the dominion government to make up its mind as to what it should do.[14] This last consideration is particularly important because it meant that BC's position prevailed by default. Notwithstanding its fiduciary responsibilities and a legal opinion that supported the existence of aboriginal title in the province, Ottawa would not go it alone and would not force the matter into the courts.

Certainly much has changed since those days: we have the *Nisga'a Treaty,* judicial decisions acknowledging aboriginal rights, constitutional protection for such rights, a treaty process and a general acceptance that major changes must occur. But not everything has changed; and progress was slow after the legislative ban on land claims was lifted in 1951, when the second major campaign for aboriginal title in BC— the current one — began to take shape. There were many reasons for this, but certainly one was that the politicians in Victoria and Ottawa, including the lawyers and judges from whose ranks some of them were drawn, knew little of the history of the Land Question. For them, land claims were not only something new; they were something that Indians had cooked up when they had time on their hands and nothing else to do. As a consequence, I think a good argument can be made that McBride's assessment of the situation in 1910 does not sound as dated as it should, even today. The complex relationship between aboriginal title and economic prosperity is as important now as it was when McBride — who no doubt thought he was doing posterity a favour — managed to keep the courthouse doors firmly closed. And we were well into my second period before it began to become clear just how wide those doors might open.

2. The Nature of Aboriginal Title, 1973-1997

In the mid-1970s the Nisga'a case and Cree opposition to Quebec's hydroelectric power project in James Bay obliged Ottawa to change its position yet again on aboriginal rights. A federal land claims policy was instituted, pursuant to which significant treaties were made in the northern regions of this country. In 1982 Canada's constitution was amended to recognize and affirm "the existing aboriginal and treaty rights of the aboriginal peoples of Canada."[15] A number of Supreme Court of Canada decisions were handed down that revived a centuries-old tradition of jurisprudence that had been largely forgotten in this country by the mid-1800s and that poured content into some of these rights.[16] In the wake of Oka, the federal government established the Indian Claims Commission to report on treaty and *Indian Act* claims.[17] And in British Columbia a special treaty process was established.

However, although the right to litigate aboriginal rights was no longer an issue, British Columbia continued to resist during the 1970s and 1980s by refusing to participate in the *Nisga'a Treaty* negotiations and by maintaining that there was no aboriginal title in the province. And, much as they had before the First World War, resource extraction and settlement pressures were forcing more and more aboriginal people to take action. By 1985, for example, the writ in *Delgamuukw* had been filed and the Lyell Island blockade in Haida Gwai was in place. Legally, however, the turning point was the Meares Island decision. For the first time, a BC court ruled that the matter of aboriginal title was sufficiently important to justify issuing an injunction against logging. In that case, Seaton, JA wrote that the

> proposal is to clear-cut the area. Almost nothing will be left. I cannot think of any native right that could be exercised on lands that have been recently logged ... The Indians wish to retain their culture on Meares Island as well as in urban museums.[18]

Significantly, this passage, dealing as it does with the problem of ensuring that what is being negotiated or litigated will still be there when these processes are over, was resurrected and quoted two weeks ago in the Haida decision — as to which, more below.[19]

Within two years of Meares Island the *Delgamuukw* lawsuit went to trial, and between the decision of the trial judge in that case and the Court of Appeal's ruling in 1993, Canada, British Columbia and the First Nations Summit agreed to set up the BC Treaty process. I don't think anyone thought that the road ahead would be easy, but the change was historic in its implications.[20] British Columbia had finally acknowledged that McBride was wrong: aboriginal rights had a legal as well as a political dimension, and the province had to come to terms with this. The problem was that for some, aboriginal rights were no more than non-exclusive rights to hunt and fish on crown land, while for others they amounted to a form of ownership and governance. This gap, together with other important differences, made progress at the negotiating tables difficult. And it was not bridged, at least with respect to land title, until *Delgamuukw* reached the Supreme Court of Canada and that Court ruled that aboriginal title was in fact a right to the land itself.[21] But then a new gap —an abyss, some might say — opened up between the parties.[22]

It became clear that governments and First Nations took a very different view of what *Delgamuukw* required governments to do while treaties were being made. And in this respect I think that something else Justice Seaton said in 1985 in the Meares Island case is instructive. Responding to the argument that halting logging on the island would render investments throughout the province uncertain, he agreed that there was a problem with forest tenures and aboriginal title that had not been dealt with in the past. But he did not agree that this meant that the courts should back off. "We are being asked to ignore the problem as others have ignored it," he wrote. "I am not willing to do that."[23] This passage is not quoted in the recent Haida decision, but I rather think that it helps to explain that case and a number of others.

3. The Meaning of the *Delgamuukw* Decision, 1998 —

For years the courts have been making the obvious point that judges cannot write treaties, and the Supreme Court of Canada added its voice to this chorus in *Delgamuukw* by urging negotiated solutions. Since then, however, decisions have been handed down that go beyond mere cheerleading. Most of these decisions are clearly intended to facilitate and protect negotiated settlements. Whether they all actually do so is a matter for debate.

(a) Governance

The first one worth noting is *Campbell et al. v. AGBC et al.*[24] Launched by Premier Campbell and Attorney General Plant before they held those offices, the litigation was in essence a challenge to the self-government provisions of the *Nisga'a Treaty*.[25] Indeed, until this case it was unclear whether the courts would hold that there was room in s. 35 of the *Constitution Act*, 1982 for an inherent right of aboriginal self-governance. The Supreme Court of Canada had left the question open, and the plaintiffs argued that confederation had extinguished any rights to self-government aboriginal people may have had by exhaustively distributing all governance powers between parliament and the provincial legislatures.[26] Justice Williamson, however, ruled not only that a limited form of self-government survived confederation and was affirmed by s. 35, but that the Nisga'a Treaty properly and legitimately gave that limited right definition and content.[27]

Is this a correct statement of the law, i.e., is *Campbell* an aberration? I think not. Certainly there are passages in the Supreme Court of Canada's recent decision in *Mitchell v. MNR* that imply that the justices of that Court may be ready to follow suit. In his concurring reasons, Justice Binnie continued to leave open the possibility that s. 35 might protect aboriginal or treaty rights of governance, and referred to, without expressly adopting, the Royal Commission on aboriginal people's characterization of "shared sovereignty" as a defining characteristic of Canadian federalism.[28] So it seems likely that the basic thrust of Justice Williamson's decision — which really could not be appealed — will ultimately be affirmed.[29]

Ironically, we would not have arrived at this point so quickly if the current premier and attorney general had not forced the issue with their lawsuit. In this respect the question in the treaty referendum that seeks to confine the legal status of aboriginal governments to that of a municipality therefore looks rather like an attempt to turn back the clock.[30] Certainly it is dangerous, because the authority of the province even to participate in treaty making is "a nasty little constitutional issue" that everyone in the current treaty process has, for good practical reasons, chosen to avoid.[31] And given the federal government's unquestioned authority to do so, there appears to be nothing to prevent Ottawa from negotiating *Campbell* forms of governance (the case, that is, not the man) with individual First Nations without provincial participation.[32] Nothing, at least, apart from Ottawa's traditional reluctance to tweak provincial sensibilities in this way. But that reluctance may be weakening.[33]

(b) Costs for Litigating Aboriginal Title

The *Campbell* case can be seen as an explicit judicial affirmation of the treaty process employed in the Nisga'a negotiations. But the court there was dealing with a *fait accompli*. Other recent cases of note are concerned more with the failures of treaty making in BC, and not simply because their backdrop is a process that a number of First Nations have refused to join and in which no treaties have been signed. Some of the judgments go further, explicitly referring to the state of treaty negotiations as a factor in the decision. In *Nemiah Valley Indian Band v. Riverside Forest Products Ltd.*, for example, Justice

Vickers ordered Canada and British Columbia to pay the future costs of the plaintiff Indian Band's aboriginal title action. The defendants had argued that costs should not be awarded because the Tsilhqot'in and Xeni Gwet'in had "failed to take advantage of the availability of public funding for treaty negotiations," but the court disagreed.
Citing both the state of treaty negotiations generally and the fact that the provincial government's proposed treaty referendum had cast "a cloud . . . over the entire process," Justice Vickers concluded that it would be "unfair and unreasonable" to "require the plaintiffs to engage, against their better judgement, in treaty negotiations." He also noted that they had already "invested" years in the litigation process. "If I were to accede to the arguments of the defendants," he concluded,

> It would mean putting the litigation on hold to pursue an uncertain process that is about to be redefined by a referendum whose questions are unknown. In addition, I cannot ignore the fact that the current process has yet to produce a completed treaty.[34]

This decision signals something very new. Costs are supposed to *follow* the event, in the sense that they are generally awarded to the successful party *after* the trial is over. Here they were awarded in advance, before the outcome is known. And although the Court of Appeal made a similar order in favour of the Okanagan Indian Band a few weeks earlier, that court made no reference to the referendum or the treaty process and had described the jurisdiction to make such an order as narrow and exceptional. It had only made the order, according to Justice Newbury, because the case was a test case on a matter of "public importance."[35] But as Attorney General Plant subsequently asked, "What aboriginal case isn't a test case in BC?"[36] Justice Vickers' ruling suggests that the attorney general's question may have been answered. Whether these decisions (as they appear to do) will encourage litigation or spur the parties in the treaty process to improve it remains to be seen. In this connection, it is perhaps worth noting that the Ministry of the Attorney General has recently announced that operational funding for the BC Treaty Commission will be reduced and funding for "consultation units and advisory committees" will be eliminated.[37]

(c) Provincial Jurisdiction

Next up is the rather difficult decision in *Paul v. British Columbia* (Forest Appeals Commission), which the Court of Appeal decided in June of 2001.[38] Frankly, it raises too many complex constitutional issues to go into in a survey of this sort.[39] The result of the decision, however, is that the province does not have constitutional authority to confer jurisdiction to decide questions of aboriginal title or rights on a provincial official or tribunal. Only courts have such jurisdiction. Now, this cannot mean that provincial officials may not take aboriginal rights and title into consideration when planning resource development on lands subject to aboriginal claims, because that would surely be inconsistent with the crown's duty to consult. Nor, I think, does it mean that — short of an actual treaty — the province cannot enter into agreements with First Nations about matters of mutual interest. Generally speaking (and subject to questions of capacity), anyone, whether an individual, a corporation or a government, may make a contract with anyone else.[40] Constitutional problems arise only when the province attempts to legislate aboriginal rights or have its tribunals adjudicate them. But the case does appear to mean that, instead of being the ultimate decision-maker, courts will move to the head of the line. By this I mean that, instead of reviewing tribunal decisions on aboriginal rights, courts will determine them in the first instance, either by assessing the defence of aboriginal rights in a prosecution, or by hearing applications for an injunction or a declaration as to whether the crown is consulting adequately.[41] Or, perhaps, even by deciding lawsuits brought by First Nations for trespass on their lands. This is basically what the dominion's lawyer recommended that Ottawa do, as trustee for the Indians, in 1909 and what Kent McNeil has recommended much more recently.[42] Like the cases on costs, this decision therefore appears to move us, at least in the short to medium term, in the direction of litigation.[43]

(d) The Presumption of Aboriginal Title

The most important issue that the Court of Appeal has addressed recently is, however, the obstacle I referred to earlier as characterizing the post-*Delgamuukw* legal environment. That is, the assumption by governments that the only aboriginal rights they are legally obliged to recognize are rights that have been defined by a treaty or found to exist by a court.
What the Court of Appeal would ultimately say about this assumption was anticipated last year in Justice Huddart's dissent in the Paul case, where she described the assumption as "flawed."[44]

Seven months later, in *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project* a majority of the court agreed.[45] And a month after that a unanimous panel in *Haida Nation v. British Columbia (Minister of Forests)* confirmed this to be the law. "The issue," said the court, "is an important one."

> If the Crown can ignore or override Aboriginal title or Aboriginal rights until such time as the title or rights

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> are confirmed by treaty or by judgment of a competent court, then by placing impediments on the treaty process the Crown can force every claimant of Aboriginal title or rights into court and on to judgment before conceding that any effective recognition should be given to the claimed Aboriginal title or rights, even on an interim basis.[46]

Referring to the contrary view as the "timing fallacy," Justice Lambert ruled that proof of aboriginal title is not a condition precedent to the crown's obligation to consult about, and to try to accommodate, possible infringements of that title. He conceded that there could be no conclusive determination of whether there has been an infringement, and whether it was justified, until the precise nature of the rights involved has been proved. Nonetheless, the duty to consult and accommodate is legally binding from the moment a First Nation makes a credible *prima facie* claim, and constitutes "an alternative framework" for reconciling aboriginal claims and the public interest.[47] Given that there is now both a duty to consult once a claim is made and a supervisory role for the courts, the Haida case may also undermine governmental policies against litigating and negotiating a treaty at one and the same time.[48] Justice Lambert added that, when a court ultimately comes to consider "the aboriginal title ... of the Haida people," the way in which the duty to consult and accommodate has been discharged would have a "very significant impact" upon the determination as to whether any infringements were justified. Given that the Haida commenced a title action in the BC Supreme Court soon afterwards, I imagine that this latter statement may have prompted some late night sessions in the halls of government.[49]

At least one commentator has already characterized these decisions as judicial legislation.[50] To a certain extent, this is a phenomenon that became inevitable once *Delgamuukw* resurrected the law contained in the *Royal Proclamation* of 1763 and the foundational 19th century cases, because taking aboriginal rights seriously after all these years necessarily entails some new thinking. But the judges' reasons all cite Supreme Court of Canada decisions in support, and the principle that governments should be prudent when potential legal or constitutional rights are at stake is not a new one. After all, courts do not generally decide in advance whether such rights have been violated: they tell us afterwards, and it is then that we find out what the violation will cost us.[51] It seems to me that these cases are simply saying that this principle, which certainly applies to police searches, also applies to forest tenures. In fact, we were probably told this more than a hundred years ago in another piece of logging litigation, *St. Catherine's Milling.* In that case the Judicial Committee of the Privy Council stated that provinces could not use aboriginal title lands "as a source of revenue [until] the estate of the Crown is disencumbered of the Indian title."[52] Because for over a century BC maintained — uniquely —that there was no aboriginal title in the province to extinguish, it did not regard the principle as applicable. *Delgamuukw* and the *Haida* case, I would argue, reinforces *St. Catherine's* by adding the logical corollary that if governments seek to access this source of revenue before the title issue is resolved, they need to consult and negotiate with the First Nation claiming ownership. If they do not, they are taking a significant legal risk.

Does all this mean that in this fourth, post-*Haida* period, incentives are now in place for more meaningful negotiations, both at the treaty table and elsewhere? I think that is what the courts intend to happen, and there is no doubt that the periods are getting shorter. It took over a century to get over crown immunity, a quarter of that to re-establish aboriginal title as a property right, and only four years to confirm that aboriginal title has some clout even before it is litigated. But more meaningful negotiations are also what the Supreme Court of Canada was aiming for in *Delgamuukw,* and it did not quite work out that way. It is, perhaps, too early to tell.

The reality, I think, is that negotiated settlements are, in the end, the only solution. But they may be possible only if the courts provide a framework that gives all the parties a better idea of where they stand, and if the parties — all the parties — are truly committed to making just and honourable settlements.

[1] Quoted by Rowles, JA in the Court of Appeal's review of that decision. See *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*, [2002] BCJ No. 155 at para. 130.

[2] A copy of the petition may be found in the Vancouver City Archives (VCA).

[3] Details of this proposal may be found in Hamar Foster, "A Romance of the Lost: The Role of Tom MacInnes in the History of the British Columbia Indian Land Question" in G. Blaine Baker and Jim Phillips, eds. *Essays in the History of Canadian Law*, Vol. VIII (Toronto 1999) at 171-212.

[4] See McKenna to McBride, 29 July 1912, excerpted in Special Joint Committee, *Report and Evidence* (Ottawa, 1927) at 9. This was not the first time that Ottawa backed down on the title question: they had done so in the 1870s in order to secure BC's agreement to setting up the Joint Indian Reserve Commission.

[5] McBride to Laurier, 19 November 1910, GR 441, Box 149, BCARS, cited in Jeannie L. Kanakos, *The Negotiations to Relocate the Songhees Indians*, 1843-1911 (MA thesis, SFU, 1974) at 71.

[6] The *British Columbia Indian Situation: Report of Interview Had with the Government of British Columbia at Victoria, on 23rd January 1912* (Conference of Friends of the Indians of British Columbia) at 3: VCA, PAM 1912-2. This is a transcript of the meeting, and McBride made his report on his talks with Harcourt at the outset.

[7] RSC 1927, c. 98, s. 141.

[8] *Calder v. AGBC* (1973), 34 DLR (3rd) 145 (SCC). This immunity was not removed until 1973, too late for the Nisga'a case.

[9] Calder v. AGBC (1971), 13 DLR (3d) 64 (BCCA).

[10] In *R. v. Sparrow* (1987), 32 CCC (3d) 65 at 80-84, the BC Court of Appeal emphatically rejected the province's interpretation of the legal effect of their decision in *Calder*. That decision, the court said, had "not, since the pronouncement of the judgment of the Supreme Court of Canada in the same case, been binding on anyone." The notion that it did was an "error" and a "fallacy," and amounted to treating the Supreme Court decision as if it "did not exist."

[11] On the Douglas Treaties see Hamar Foster and Alan Grove, "The True Interests of the Whites: A New Perspective on the Short History of Treaty Making in Nineteenth Century British Columbia" (forthcoming). On Treaty 8, see Arthur J. Ray, "Treaty 8: A British Columbia Anomaly" *BC Studies* no. 123, Autumn 1999 at 5-58 and, most recently, the FCTD decision in *Benoit v. Canada*, [2002] FCJ No. 257.

[12] Ditchburn to the Indian agent at New Westminster, 2 March 1923, National Archives of Canada, RG10, Vol. 11047, File 33/General, Part 7. Ditchburn states that the minister had informed the Allied Tribes the previous year "that the Government of Canada were prepared to concede the fact that the Indians had a case and that if it reached the [Judicial Committee of the Privy Council] the decision, *no doubt*, would be in the Indians' favour [and so] was prepared to discuss with them a method of settling this long-standing dispute" [emphasis added]. Ditchburn also said that such a settlement was expected "during the late spring or early summer months…"

[13] The point about power is obvious: Indians could not vote, could not get their claims into a court and had to raise nearly all the funds for their lobbying themselves. For examples of disunity, see the opposition of the United Tribes of BC (nine Tsimshian groups) to the Judicial Committee of the Privy Council hearing the Nisga'a petition, and the intervention of two interior chiefs in the 1927 parliamentary hearings in order to contest the position of the Allied Tribes: see letter dated 10 March 1919 from Henry D. Pierce to the Privy Council, PRO, PC 8/1240 and Special Joint Committee, *Report and Evidence* above n. 4 at 135-146.

[14] Deputy Superintendent Duncan Campbell Scott himself stated that the history of the issue revealed "the Provincial Government ever constant in the stand that there is no Indian title in the Provincial lands, and the Dominion Government uncertain of its position on that question…" (Special Joint Committee, *Report and Evidence*, above n. 4 at 6-7).

[15] *Constitution Act*, 1982, s. 35(1).

[16] E.g., *Guerin v. R* (1984), 13 DLR (4th) 321, *CPR Ltd. v. Paul*, [1988] 2 SCR 654 and *R. v. Sparrow*, above n. 10.

[17] According to its most recent annual report, "the settlement of specific claims continues to be a painfully slow process:" see *Indian Claims Commission: Annual Report 2000-2001* (Ottawa 2001) at 1.

[18] *MacMillan Bloedel Limited v. Mullin et al.*, etc. (1985), 61 BCLR 145 (CA) at 151, 156 (per Seaton, JA) quoted by Lambert, JA in *Haida Nation v. British Columbia (Minister of Forests)*, [2002] BCJ No. 378 at 3.

[19] See text accompanying notes 46-49.

[20] See Hamar Foster and Alan Grove, "Looking Behind the Masks: A Land Claims Discussion Paper for Researchers, Lawyers and Their Employers" (1993) 27 *UBC Law Review* 213.

[21] *Delgamuukw v. British Columbia* (1997), 153 DLR (4th) 193 (SCC) and see Hamar Foster, "Aboriginal Title and the Provincial Obligation to Respect It: Is *Delgamuukw v. British Columbia* 'Invented Law'?" (1998), 56 *the Advocate* 221.

[22] For an account of this gap that goes beyond the merely legal see James Tully, "Reconsidering the Treaty Process" in *Speaking Truth to Power: A Treaty Forum* (BCTC 2001) at 3-17

[23] *MacMillan Bloedel Limited v. Mullin et al.*, above n. 18 at 160.

[24] *Campbell et al. v. AGBC/AG Can* (2000), 79 BCLR (3d) 122 (BCSC). The decision has not been appealed, presumably because the Nisga'a Treaty obliges the parties to uphold the treaty and because the appellants (the premier and two cabinet ministers) and some of the respondents would now be the same parties.

[25] See Hamar Foster, "Honouring the Queen's Flag: A Legal and Historical Perspective on the Nisga'a Treaty," *BC Studies*, No. 120, winter 1998/99 at 11 and Doug Sanders "'We Intend to Live Here Forever': A Primer on the Nisga'a Treaty" (1999), 33 *UBC Law Review* 103.

[26] The argument is an old one: see Foster, "Honouring the Queen's Flag," preceding note, at 34-35.

[27] Above n. 24 at 158.

[28] *Mitchell v. MNR* (2001), 199 DLR (4th) 385 (SCC). See also Patrick Macklem, "Recent developments in Aboriginal Rights: A Thematic Overview" (CLE, *Aboriginal Law Conference* 2002) at 1.1.10-1.1.11.

[29] It could not be appealed because Mr. Campbell and Mr. Plant became premier and attorney general, and the Nisga'a treaty obliges the parties to uphold and defend the treaty. Even if it did not, Campbell and Plant would be both appellants and respondents, and would have to instruct counsel for both sides. One wonders if this was considered when the original proceedings were launched.

[30] Question 9, as originally proposed, read: "The Province will negotiate Aboriginal Government with the characteristics and legal status of Local Government" (Select Standing Committee on Aboriginal Affairs Report, 2001 at 19). As tabled in the Legislative Assembly on 12 March 2002, it reads: "Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia." The substitution of "should" for "will" is arguably a softening of the government's position.

[31] See Patrick Macklem, "The Probable Impact and Legal Effect of the Proposed Treaty Referendum" in Vol. 59, Part 6 of *the Advocate* (2001) 895 at 902.

[32] Lawyers tend to name legal principles after the cases that established them: a "*Mareva*" injunction for example, or a "*Corbett*" application. Given the premier's position on the issue, it would therefore be even more ironic if the inherent right to self-government comes to be known as "*Campbell*" self-government.

[33] Federal policy currently excludes such an approach. However, the Hon. Robert Nault indicated on March 15, 2002 that the federal government was "looking at all its options," including governance initiatives under the Indian Act and the First Nations Land Management Act (transcription prepared by Media Q Inc. for INAC, 15 March 2002).

[34] [2001] BCJ No. 2484 at paras. 26-29. Since this case was decided, the questions have been announced: see, e.g., n. 30, above.

[35] *British Columbia (Ministry of Forests) v. Okanagan Indian Band* [2001], BCJ No. 2279 (BCCA) at para. 37.

[36] Vaughn Palmer, 'Who Pays ? Rulings on Natives to be Appealed,' *Vancouver Sun*, 14 December 2001. I am grateful to Alan Grove for drawing this reference to my attention.

[37] *Ministry of the Attorney General and Minister Responsible for Treaty Negotiations Service Plan Summary* 2002/03-2002/04 at 4.

[38] [2001] BCJ No. 1227 (14 June 2001). The constitutional issue in this case was whether the BC legislature had authority to confer jurisdiction on a district manager, an administrative review panel or the Forest Appeals Commission to decide questions of aboriginal title and rights. The court held (Huddart, JA, dissenting) that it did not.

[39] For a commentary that is critical of the majority decision see Thomas Isaac, "Provincial Jurisdiction, Adjudicative Authority and Aboriginal Rights: A Comment on *Paul v. BC* (Forest Appeals Commission)" in Vol. 6, Part 1 of *the Advocate* (Jan. 2002) at 77-88.

[40] I say "short of an actual treaty" because treaty making is, pursuant to s. 91(24) of the Constitution Act, 1867, an exclusively federal responsibility: see text accompanying n. xx, above. It should also be noted that one writer has suggested that *Paul* precludes BC from making bilateral agreements with First Nations that recognize aboriginal rights. See Barbara Fisher, "The Constitutional and Fiduciary Duties of the Provincial Crown: The Impact of Recent Decisions on the Duty to Consult & the Determination of Aboriginal Rights" (*CLE, Aboriginal Law Conference 2002*) at 4.1.14-15 and 4.1.17. Admittedly, these questions are complex (and getting more so).

[41] As to which, see the discussion of the *Haida* case accompanying notes 46-49, below.

[42] See "A Romance of the Lost," above n. 3 and Kent McNeil, "The Onus of Proof of Aboriginal Title" (1997), 37 *Osgoode Hall Law Journal* 775.

[43] On the other hand, as Donald, JA, stated in his concurring reasons at para. 104, it is "pointless … to tie up forest tribunals with complex aboriginal rights cases when they are destined for court anyway." Justice Donald was also worried (para. 95) "about the appearance of a tribunal so closely connected to the government deciding cases of aboriginal rights when that same government may be an adversary in the dispute."

[44] Above n. 38 at para. 119.

[45] Above, n. 1. As Rowles, JA, put it at para. 174, the Supreme Court of Canada has said that s. 35(1) of the Constitution Act, 1982 provides a foundation for negotiating and settling aboriginal land claims. Therefore to "say, as the Crown does here, that establishment of the aboriginal rights or title in court proceedings is required before consultation is required, would effectively end any prospect of meaningful negotiation or settlement of aboriginal land claims."

[46] [2002] BCJ No. 378, at para. 10 [emphasis added].

[47] *Ibid.*, at para. 11 and 14. As Lambert, JA, put it at para. 41, the fact that conclusive determinations must await trial does not mean "there is no fiduciary duty on the Crown to consult the aboriginal people in question after title is asserted and before it is proven to exist, if, were title to be proved, there would be an infringement."

[48] On 15 March 2002 the Hon. Robert Nault (above n. 33) acknowledged that the federal government had a policy "that says that you have to put your lawsuit in abeyance if we're going to be at the negotiating table so that we can have freedom to talk about the issues. But look, " he added, " you know these processes are fluid." Although he did not mention the fact that this is not the rule in ordinary civil suits, his remarks may nonetheless represent a relaxation of the policy.

[49] And not only there: the *Haida* case, rather surprisingly, also imposed a duty to consult on *Weyerhauser*, the forest company involved in the case. Fisher, above n. 40 at 4.1.10-4.1.13, provides a thoughtful criticism of this aspect of the decision.

[50] Fisher, *ibid.*, at 4.1.01 and 4.1.12.

[51] Cf. Huddart, JA in *Paul*, above n. 38 at paras. 118-119.

[52] *St. Catherine's Milling & Lumber Co. v. R.* (1888), 14 App. Cas. 46 (PC) at 59.

Murray Rankin, Arvay Finlay, Barristers

The case for tripartite negotiation

At this moment in the program, I feel like a journalist who has been scooped many, many times over the past two days. Given this, I will make my presentation shorter rather than repeat what has already been said. To be clear at the outset, the views I express here are mine and mine alone.

The question I will explore is the tripartite treaty process, characterized as, "Should the Province of British Columbia be involved in self-government negotiations?" To put that question in context, I want to share a small, but important interchange that took place several years ago between two negotiators. The provincial negotiator asked, "Why do you want the Province involved anyway?" The aboriginal negotiator replied, "Because you are always in our face. Almost all our interactions on the land are with the Province so practically, it's the Province that we end up dealing with the most."

Within this question of whether the Province should be involved in aboriginal self government, I think there are at least four distinct and complicated landscapes that need to be considered. The first of these is the legal landscape formed by the Constitution, the division of powers jurisprudence, and competing legal interests. The second landscape is the political realm formed by the politicians, interest groups, parties and governments, various publics, and written and unwritten power relationships and negotiations. The third landscape comprises the physical and geographic landscape with aboriginal and non-aboriginal communities in B.C., close or distant neighbours with economic and working ties of varying strength.

The final landscape comprises the interpersonal and social relationships created by the combination of aboriginal and non-aboriginal families across B.C. I think this last landscape, reflected in the personal and social lives of aboriginal and non-aboriginal citizens, in households, in classrooms and on playgrounds, and in the continuing myriad of social relationships and interactions, is undervalued in most self-government discussions. This last landscape is the consequence of the other landscapes. That is, any negative or positive aspects of the other landscapes usually shape the human and interpersonal realities of people and families.

Answering the question of whether the Province should be involved with aboriginal self government requires consideration of each of these four landscapes. None of them is isolated. Instead, the landscapes form a composite whole.

I will begin with the legal landscape, but since much of this ground has been covered, I will only examine several of its landmarks.

I think the question of whether aboriginal self government forms an aboriginal right under s.35 of the *Constitution Act, 1982* has now been answered beyond doubt in the affirmative. In *Delgamuukw v. British Columbia,*[1] the Supreme Court of Canada did not reject a s.35 right to self government, but instead left the scope of the right open to be determined. In *Campbell v. A.G.B.C., A.G. Canada, Nisga'a Nation et al,*[2] Mr. Justice Williamson for the British Columbia Supreme Court held that ss.91 and 92 of the *Constitution Act, 1867* did not exhaustively distribute all legislative powers between Parliament and the provincial legislative assemblies, and that aboriginal self government continued, albeit in a diminished form.

Arguably in the self-government jurisprudence to date, the courts have failed to properly consider the political powers of aboriginal governments. Instead, the Supreme Court of Canada has consistently recharacterized the right as a narrow, specific activity rather than as a broader self-governing right claimed by the aboriginal group.[3] The approach of the courts has been to apply the "integral to a distinctive culture" aboriginal rights test set out by the Supreme Court of Canada in *Sparrow*[4] and *Van der Peet.*[5] So we have troubling cases like *Pamajewon*[6] where the Supreme Court of Canada considered whether high-stakes gambling was integral to a distinctive culture, rather than examining the broader right of self government over traditional territories.

Self government is real, but it remains inchoate in this legal landscape. The scope and content of self government remains open remain to be challenged and defined on a case-by-case basis. So what is the role of the Province in this legal landscape? The Supreme Court of Canada has made it clear that aboriginal and treaty rights are within the heart of exclusive federal legislative authority. A province does not have the capacity to legislate in respect of aboriginal or treaty rights. Indeed, the recent *Paul* made that all too clear.[7] In *Paul,* the BC Court of Appeal held that the provincial legislature was without authority to confer quasi-judicial jurisdiction on the Forest Appeals Commission to consider questions of aboriginal rights and title.

Furthermore, provincial laws of general application that affect the exercise of aboriginal or treaty rights must receive federal permission before they can be applied. So should the Province be involved in aboriginal self-government negotiations? Arguably, the Province should not have a role because it does not have the requisite jurisdictional capacity.

However, in the *Quebec Secession Reference*, the Supreme Court of Canada strengthened the role of the Provinces by re-orienting the sharing of power between two orders of government — that of the Provinces and the central government.[8] According to the Court, powers were to be distributed to the government that is best suited to achieving the particular societal objective, having regard to the diversity in Canada.[9]

> [T]he Supreme Court wrote that the federal system is only partially complete "according to the precise terms of the *Constitution Act, 1867*" because the "federal government retained sweeping powers that threatened to undermine the autonomy of the Provinces". ...[S]ince the written provisions of the Constitution do not provide the entire picture" of the Canadian federal structure, the courts have had to "control the limits of the respective sovereignties".[10]

The *Quebec Secession Reference* appears to strengthen the role of the Province generally and this may be reflected in future self-government decisions that challenge the division of powers.

Another aspect of this legal landscape is the role of the Province insofar as natural resources are concerned. Any self-government issue that relates to natural resources will bring in the Province, if not directly as a party, certainly indirectly, as an entity that will be directly impacted by the handiwork of the federal and aboriginal negotiating partners. In other words, even if the Province does not have a legal role in self-government litigation, its interests will be seriously implicated by the courts and by the parties.

The courts frame aboriginal rights against their infringement and if the Province is the infringing party, it will have a role at the justification stage of the aboriginal rights test. Otherwise, for aboriginal people, the best scenario might be to deal solely with the federal government in litigating any self-government right, and to leave the provincial and federal governments to sort out compensation or other issues that arise between those two levels of government.

I will now turn to the political landscape. John Ralston Saul recently beseeched all Canadians to stop what he called "childlike head-under-the-blanket approaches toward the central role of aboriginal people in the ongoing shape of Canadian society".[11] He argues that Canadians must understand "the triangular reality of our Canadian foundation". He is, of course, referring to British, French and aboriginal peoples, and drawing our attention to the triangular formation that underpins our collective history. (In fact, the Canadian national anthem has recently been amended to include other Canadians "from far and wide".)

Aboriginal nations, as an integral part of the Canadian constitutional bedrock, have systematically been undervalued in our legal and political culture. This is an inescapable conclusion reached by anyone who examines Canadian legal history.

I believe that the current federal policy precludes the federal government from negotiating constitutionally entrenched forms of aboriginal governance without the consent and participation of the Province.[12] This is not required as a matter of constitutional law. According to Professor Patrick Macklem of the University of Toronto Faculty of Law, the federal government appears to be constitutionally authorized to negotiate treaties without the participation of the provincial government, provided that the negotiations do not alter the distribution of legislative authority between the two levels of government.[13]

Nevertheless, given the federal policy and the practical on-the-ground reality of the Province as a negotiator, it would seem, at first glance, advantageous for aboriginal people to include the Province in self-government negotiations — especially when provincial heads of power are at issue. However, given the current BC government's insistence on municipal-style governments with delegated powers for aboriginal people, perhaps provincial participation would only impede the attainment of self government.

Further, according to some aboriginal people at the treaty negotiating tables, the Province has consistently attempted to subvert aboriginal interests to those of "larger economic interests" in the Province. However, aboriginal groups refusing provincial involvement may not have the political or financial resources to sustain a legal or political challenge to the federal government policy. Aboriginal groups should question the inclusion of the Province in its self-government negotiations, and, in addition, they should assess the potential consequences of various strategies regarding the Province's role.

There are several political strategies that aboriginal groups might be useful. First, it might be possible to work unilaterally with the federal government to develop specific self-government components, then to employ a whipsaw strategy to compel similar self-government approaches from the Province.

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Moreover, these bilateral negotiations with the federal government could also serve to generate capacity and confidence among aboriginal groups.

Second, an aboriginal group could agree to the Province being involved in its self-government negotiations. In this latter situation, the aboriginal group would document any perceived efforts by the Province to thwart such negotiations (e.g., by steadfastly holding to municipal delegated power models) for a subsequent court challenge based on a lack of good faith argument or other possible causes of action. Obviously these strategies would depend on the aboriginal group's resources, energy levels, and priorities.

There is a contradiction that emerges when exploring this question. There are some bilateral negotiating processes now underway that involve only the federal government and various aboriginal groups. (The Westbank model described this morning is one such example.) There are also groups that are in the process of negotiating an agreement based upon the inherent model of self government rather than the delegated municipal model. While these agreements may be "grandfathered" into the self-government process, they do raise internal inconsistency insofar as both the provincial and federal governments are concerned. In other words, if inherent self-government models are so "illegal" and so terribly bad on all accounts, why should the Province still allow them to succeed, grandfathered or otherwise?

On another related aspect of this issue, it does not make any sense for the provincial government to be a signatory to the BC Treaty Commission, but then to be absent from the tables dealing with self government. Can one really successfully cleave self-government issues from substantive treaty land and resource issues? Are they really separable? Even if such a surgical division was successful, would the resulting fragmentation of self government be desirable for aboriginal nations?

From a purely practical point of view, having the Province involved in self-government negotiations appears to be beneficial for aboriginal nations. For example, education, social services, forestry, and mining, are all provincial heads of power. For those areas, cost-sharing agreements, service purchases, and delivery of services off-reserve could include the Province.

Another important factor is that there is a land-governance connection that is surely central to any meaningful governance system. Aboriginal governance systems are no different from any other in this regard. In other words, any aboriginal governance structure necessarily connects to the land base and it would be of practical benefit to the aboriginal nations to have the Province included in its self-government negotiations for this reason alone.

Again, provincial involvement with the political negotiations requires a judgment call that must be made by a particular aboriginal nation in accordance with its goals, resources, and priorities.

Now, in any discussion of the political landscape, the upcoming BC Treaty Referendum now forms part of that landscape. Since there has already been a great deal of discussion regarding the referendum over the last two days, I will try not to repeat the serious concerns that have been raised.

My friend, Professor Hamar Foster, went back over a hundred years to draw inspiration. For my part, I draw my inspiration from a few hours ago when I read the *Vancouver Sun's* lead editorial this morning. That is how far back I go: obviously my sense of history is rather stunted. I thought it interesting that the *Vancouver Sun* focussed on the BC referendum question relating directly to self government, namely: "Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia." After describing this question as "hugely problematic", the *Sun* editors asked:

> Never mind the constitutional requirements that make the answer moot. Which definition of local government is at issue, the current one, which just about every Canadian municipality bristles at as too restrictive, or some other future definition?

When people who think First Nations are entitled to more power and those who think they deserve less power both vote no in answer to the same question, what are we to make of the result?

That, for better or for worse, is now part of the new political landscape.

Let me turn to the third aspect I want to discuss today, the physical and geographic landscape. Across British Columbia, there are aboriginal and non-aboriginal communities. Some are close neighbours sharing municipal services. Consider, for example, Duncan, a community near where I live on Vancouver Island. Other communities have great distances between them. Sometimes there are roads, sometimes not.

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Whatever the distances or terrain, aboriginal and non-aboriginal communities are ultimately bound up with one another—politically, economically, and socially. Many aboriginal and non-aboriginal people work together, go to school together, and play together — sometimes successfully, sometimes not. But no one is leaving.

In this landscape, communities are influenced by both legal and political decisions and agreements. Excluding the Province from self-government negotiations could have a negative spill-over effect upon these communities and could undermine existing relationships between aboriginal and non-aboriginal communities.

Of course, the upcoming provincial treaty referendum could damage aboriginal/non-aboriginal relationships so badly that the future provincial role just will not matter to aboriginal communities anyway. Conversely, the effects of the referendum may not prove to be as deleterious as so many speaker here have predicted. The legacy of the referendum remains unclear at this time.

Let me turn lastly to the fourth landscape, the human landscape. It is the aboriginal and non-aboriginal citizenry that ultimately experiences and bears the burden of legal and political decisions. In this way, the political is simply an extension of the personal. Negative provincial relationships affect local and personal relationships. Every effort must be made by all parties to ensure that larger political and legal agendas do not inadvertently foster hostility and intolerance between aboriginal and non-aboriginal peoples.

In conclusion, my answer to the question of, "Should the Province Be Involved in Aboriginal Self-government Negotiations?" is a qualified yes, with the proviso that if current policies impede the process, a bipartite process with the federal government and the aboriginal nations may serve as a useful bridge on the long and winding road to self government.

In the final analysis, I believe that only with provincial involvement can we achieve lasting negotiated settlements in British Columbia.

Endnotes

[1] *Delgamuukw* v. *British Columbia*, (1997), D.L.R. (4th) (SCC) 193 at para. 186.

[2] *Campbell* v. *A.G.B.C., A.G. Canada, Nisga'a Nation et al*, [2000] B.C.J. No.1524 (BCSC) at 13.

[3] For example see: *Mitchell* v. *Canada (Minister of National Revenue)*, [2001] 1 S.C.R. 911 (international trade); *R.* v. *Pamajewon*, [1996] 2 S.C.R. 821 (gambling); and *Westbank First Nation* v. *British Columbia Hydro and Power Authority*, [1999] 3 S.C.R.134 (taxation).

[4] *R.* v. *Sparrow*, [1990] S.C.C., online: QL (3 C.N.L.R. 160) at 15 and 8 respectively.

[5] *R.* v. *Van der Peet*, [1996] S.C.C. online: QL (4 C.N.L.R. 177) at para. 46.

[6] *Supra*, note 3.

[7] *Paul* v. *British Columbia (Forest Appeals Commission)*, [2001] BCJ No. 1227. (In June 2002, the Supreme Court of Canada granted an application for leave to appeal to the Attorney General of BC and the Ministry of Forests.)

[8] *In the Matter of a Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada, as set out in Order in Council P.C.* 1966-1497, September 30, 1996.

[9] *Ibid.* at 58.

[10] J. Borrows, "Questioning Canada's Title to Land: the Rule of Law, Aboriginal Peoples and Colonialism", *Speaking Truth to Power: A Treaty Forum* (Minister of Public Works and Government Services Canada, 2001) 35 at 48. According to Professor Borrows, applying the principles of federalism to aboriginal people would mean, by analogy, asking; (1) if the federal system is only partially complete as it relates to aboriginal people? and (2) did the sweeping powers of the federal government undermine the autonomy of aboriginal groups?

[11] J. R. Saul, "Rooted in the Power of Three" *Globe and Mail* (3 March 2002) online: www.uni.ca/john_ralston_saul.

[12] For example see: INAC, *Federal Policy Guide, Aboriginal Self-Government* (Minister of Public Works and Government Services Canada: Ottawa, 1995) and INAC, *Gathering Strength, Canada's Aboriginal Action Plan* (Minister of Public Works and Government Services Canada: Ottawa, 1997).

[13] P. Macklem, "The Probable Impact and Legal Effect of the Upcoming Referendum" (Nov. 2001), 59:6 *The Advocate*, 895 at 902.

Discussion Themes

Truth III brought together a diverse group of visionaries to build upon three central truths: First Nations have a right to manage their own affairs; decide their vision of self government; and seek creative solutions to make self government a reality.

Throughout the two-day forum, participants challenged one another to re-examine the way they think about self government. From this discussion, the Treaty Commission captured a number of themes.

How do we define the inherent right to self government?

Participants delved deep into their conception of self government, questioning what the inherent right really means within the context of the Canadian state. If the self government is structured as a nation within a nation, does this really allow for the same scope of governance powers that were exercised in the past?

Dr. Cornell's presentation (p. 4) shed light on the U.S. conception of the inherent right to self government. Whereas in Canada, aboriginal rights are protected under Section 35 of the Canadian Constitution, in the United States, the inherent right to self government predates the U.S. Constitution. Indigenous nations in the U.S. are recognized as sovereign nations, but there is no constitutional protection for the right to self government.

Are there more limitations on self government powers from the inherent right or from a delegated authority?

Participants discussed limits imposed on the content of self government by both the inherent and delegated models of self government, and how to broaden powers within each framework.

Lawyer Jim Aldridge (p. 43) noted Child and Family Services, for example, is easily proven as an inherent right predating European contact as it relates to family relations. On the other hand, a 'modern' activity like regulation of car traffic is not so easily demonstrated. However, traffic regulation can be shown to have evolved from regulation of other activities. This is one of the challenges imposed by the inherent right to self government.

In a delegated model, Section 91 and 92 powers currently held by the federal and provincial governments may be delegated to a First Nations government, however, there will be no constitutional protection for these powers.

Chief Sophie Pierre (p. 16) noted that the kind of genuine self rule and cultural match that Dr. Cornell found among successful indigenous nations in the U.S. could not be achieved through delegated self government. Jim Abram (p. 31) echoed this point, noting that Canadian society is structured to chain one level of government to the next — passing responsibilities without passing authority. Abram asked participants to consider how we can work towards removing the 'chain' rather than just shortening the length of that chain.

How will the Community Charter impact self government?

Participants discussed how the Community Charter could give First Nations a greater degree of flexibility within a delegated, municipal-style of governance. However, without concrete details on the Charter participants could not delve deeply into this topic.

The Inherent Right

The Canadian government recognizes that the inherent right to self governemnt already exists in the Canadian Constitution. To define the inherent right, constitutionally-protected self government, as in the *Nisga'a Treaty*, cannot be changed unless all three parties—Canada, BC and the First Nation—agree.

Visit www.nisgaalisims.ca

Delegated Self Government

In a municipal-style of self government, governance powers are delegated by an act of Parliament and an act of the BC Legislature and have no constitutional protection. The *Sechelt Indian Band Self-Government Act* is an example of a delegated, municipal-style self-government agreement.

Visit www.ainc-inac.gc.ca
Self-Government Sechelt Style

How can First Nations take control before a treaty?

Participants discussed ways that First Nations can begin taking more control over their lives while comprehenensive treaty negotiations are underway.

Chief Pierre noted that the Ktunaxa Nation assumed authority for Child and Family Services as a delegated authority, but their ultimate goal is to realize the inherent right to self government through a treaty. Westbank Chief Brian Eli noted that Westbank has been assuming greater authority for quite some time, without a formal self government agreement. Dr. Cornell outlined several case studies demonstrating how idigenous nations in the United States have successfully assumed decision-making authority.

Several participants reflected on the various governance experiences presented through the forum and considered how they could begin building governance skills and infrastructure today.

> Recognition and respect for First Nations as self-determining and distinct Nations with their own spiritual values, histories, languages, territories, political institutions and ways of life must be the hallmark of this relationship."
>
> *BC Claims Task Force Report*
> 1991

What are some important considerations in building a constitution?

Participants discussed the importance of a constitution to effective and accountable governance. Edmond Wright (p. 21) noted that the Nisga'a Nation went beyond the legal requirements of a constitution, and used it as a tool to express their nation values — the kind of cultural match Dr. Cornell suggests is important to good governance.

How important is the land base? What about jurisdiction issues?

Dr. Cornell argued that the size of a nation's land base is not the most important factor attributing to successful economic development. However, he noted that genuine decision making authority over that land — jurisdiction — is absolutely critical to economic success. Other participants felt that achieving an acceptable land base— still a small part of First Nations traditional territory — is crucial to economic success.

How can First Nations build businesses and attract investment?

Dr. Cornell reiterated his research findings: that the ability to make decisions is critical to economic success among indigenous nations. By yielding decision-making power, Cornell argued, governments can foster economic development and alleviate poverty among indigenous peoples.

By developing stable and effective governance, First Nations can attract outside investors and business partners, Cornell noted. Chief Pierre echoed this point noting that because they developed a stable environment for investors., St. Mary's Indian Band was able to attract Delta Hotels as a flagship for their St. Eugene Mission development.

Chief Pierre sees the St. Eugene Mission development, which includes re-development of the former residential school, as critical to the growth of the Ktunaxa Nation — recognizing the past while building better opportunities for the future.

How can business be separated from politics?

Participants discussed some of the challenges created by the intermingling of business and politics and considered ways to distance these two realms. Dr. Cornell and Edmond Wright concurred that a buffer zone can be created by excluding members of council from business boards. Wright noted that the Nisga'a Lisims government has created several corporations made up of business people, not politicians.

Working together

Throughout the forum, participants expressed a desire to learn to work together — to learn from each other — to make self government a reality.